FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 18 1947
CHARLES ELMORE CROPLEY
CLERK

Nos. 23-34

In the Supreme Court of the United States

OCTOBER TERM, 1947

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE CEMENT INSTITUTE, ET AL.; AETNA PORTLAND CEMENT COMPANY, ET AL.; MARQUETTE CEMENT MANUFACTURING COMPANY; CALAVERAS CEMENT COMPANY, ET AL.; HURON PORTLAND CEMENT COMPANY; SUPERIOR PORTLAND CEMENT, INC.; NORTHWESTERN PORTLAND CEMENT COMPANY; RIVERSIDE CEMENT COMPANY, A CORPORATION; UNIVERSAL ATLAS CEMENT COMPANY; CALIFORNIA PORTLAND CEMENT COMPANY; MONOLITH PORTLAND CEMENT COMPANY, ET AL.; BLAINE S. SMITH, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	5
The Federal Trade Commission's complaint	6
The findings of the Commission	8
The cement industry and respondents' position therein	9
Absence of competition in the industry	11
Respondents' multiple basing-point delivered-price system	16
Collective action to prevent competition and to maintain respondents' pricing system	20
Effects of respondents' combination	22
Violation of Section 2 of the Clayton Act	24
The Commission's conclusion and order	25
The decision of the Circuit Court of Appeals	26
Specification of errors to be urged	28
Summary of argument	29
Argument:	
I. Upon the findings and evidence, the Commission's determination that the respondents have violated Section 5 of the Federal Trade Commission Act is valid	37
A. The acts and practices with which the respondents stand charged are within the prohibitions of the Federal Trade Commission Act	38
B. Under the multiple basing-point delivered-price system used by respondent producers, there is no price competition among them	42
C. The evidence furnishes overwhelming support for the finding that respondents combined to restrain price competition among themselves and to use a system of pricing resulting in identical delivered prices	49
D. Combination among respondents not to compete in price and to sell cement under respondents' multiple-basing point delivered-price system was found by the Commission	61
1. The Commission's general findings of combination constitute findings of the combination charged against respondents	62

759732—47——1

Argument—Continued

	Page
I. Upon the findings and evidence, etc.—Con.	
D. Combination among respondents, etc.—Continued	
2. The findings of respondents' concerted action to prevent competition in price and to maintain their pricing system constitute findings of combination	65
(a) Freight rate books	69
(b) Sales f. o. b. mill and land-grant rates	71
(c) Involuntary or punitive bases	72
(d) Truck transportation	74
(e) Diversion in transit	76
(f) Standardization of terms of sale	78
(g) Classification of dealer business	78
(h) Boycott of dealers handling imported cement	80
E. The court below erred in holding that the Commission had relied upon incompetent or inadmissible evidence	81
1. Respondents' activities during the effective period of the National Industrial Recovery Act	81
2. The Treanor letter	86
F. The evidence and findings sufficiently connect all of the respondents with the combination found to exist among them, and the Commission's order should be affirmed as to each respondent	90
II. The Commission's determination that the respondents have violated Section 2 (a) of the Clayton Act is valid	104
A. Each respondent discriminated in price within the meaning of Section 2 (a) when it sold cement at delivered prices yielding a greater net return in some localities than in others	104
B. When respondents' various base mills systematically sold at higher net prices in many localities than in others, the systematically lower net prices in such other localities were not made "in good faith" to meet the equally low price of a "competitor," within the meaning of the proviso to Section 2 (b) of the Clayton Act	112
C. Respondents' discriminatory prices have the effect and tendency "substantially to lessen competition" in the sale of cement and "to injure, destroy, or prevent competition" among themselves, and constitute prohibited price discriminations	117
III. The court below misapprehended the meaning and economic effects of the Commission's order	120
Conclusion	129

CITATIONS

Cases:

	Page
Addyston Pipe & Steel Co. v. United States, 175 U. S. 211	39
American Tobacco Co. v. United States, 147 F. 2d 93	50, 95
American Tobacco Co. v. United States, 328 U. S. 781	50, 60, 95
Bridges v. Wixon, 326 U. S. 135	89
Cement Mfrs. Ass'n. v. United States, 268 U. S. 588	11, 40, 117
Corn Products Rfg. Co. v. Federal Trade Commission, 324 U. S. 726	34, 109, 110, 116, 118
Direct Sales Co. v. United States, 319 U. S. 703	97
Eastern States Retail Lumber Dealers' Ass'n. v. United States, 234 U. S. 600	50
Eugene Dietzgen Co. v. Federal Trade Commission, 142 F. 2d 321, certiorari denied, 323 U. S. 730	68, 85, 96
Fashion Originators' Guild, Inc. v. Federal Trade Commission, 312 U. S. 457	39
Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67	51
Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441	38, 41
Federal Trade Commission v. Keppel & Bro., Inc., 291 U. S. 304	38
Federal Trade Commission v. Pacific States Paper Ass'n, 273 U. S. 52	41, 51
Federal Trade Commission v. Staley Mfg. Co., 324 U. S. 746	35, 45, 107, 109, 113, 115
Fort Howard Paper Co. v. Federal Trade Commission, 156 F. 2d 899, certiorari denied 329 U. S. 795	55, 56
Interstate Circuit, Inc. v. United States, 306 U. S. 208	31, 50, 54, 67, 97
Interstate Commerce Commission v. Baird, 194 U. S. 25	89
Maple Flooring Ass'n v. United States, 268 U. S. 563	117
Mennen Co. v. Federal Trade Commission, 288 Fed. 774, certiorari denied, 262 U. S. 759	119
Milk & Ice Cream Can Institute v. Federal Trade Commission, 152 F. 2d 479	55
National Biscuit Co. v. Federal Trade Commission, 299 Fed. 733	119
Northern Securities Co. v. United States, 193 U. S. 197	128
Phelps Dodge Rfg. Corp. v. Federal Trade Commission, 139 F. 2d 393	95
Schechter Poultry Corp. v. United States, 295 U. S. 495	82
Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346	120
Standard Oil Co. v. United States, 221 U. S. 1	32, 84
Sugar Institute, Inc. v. United States, 297 U. S. 553	66, 68
United States v. Bausch & Lomb Optical Co., 321 U. S. 707	67
United States v. International Harvester Co., 274 U. S. 693	89
United States v. Masonite Corp., 316 U. S. 265	40, 67

Cases—Continued Page

United States v. *Pullman Co.*, 50 F. Supp. 123 50
United States v. *Reading Co.*, 253 U. S. 26 85
United States v. *Schrader's Son, Inc.*, 252 U. S. 85 50
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 ..... 39, 40, 50, 85
United States v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 128
United States v. *Sugar Institute, Inc.*, 15 F. Supp. 817 ..... 66, 68
U. S. Maltsters Assn. v. *Federal Trade Commission*, 152 F. 2d 161 ..... 50, 52
Van Camp & Sons Co. v. *American Can Co.*, 278 U. S. 245 119

Statutes:

Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526:
Sec. 2, 15 U. S. C. sec. 13 ..... 4, 5, 34, 35, 45, 112, 113, 114, 118, 119, 125
Federal Trade Commission Act, Sec. 5, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45 3
National Industrial Recovery Act, 48 Stat. 198 82

Miscellaneous:

Clark, *Imperfect Competition Theory and Basing-Point Problem.* (1943), 33 Amer. Econ. Rec. 283 59
Executive Order No. 6767 56
H. Rep. No. 2287, 74th Cong., 2d sess., p. 8 120
Mund, *Monopolistic Competition Theory and Public Price Policy* (1942), 32 Amer. Econ. Rev. 727 59
S. Rep. No. 1502, 74th Cong., 2d sess., p. 4 120
Vanderbilt, *The Technique of Proof before Administrative Bodies*, 24 Iowa L. Rev. 464 89
Wigmore, *Evidence* (3d ed. 1940), Secs. 1048, 1714 89

In the Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 23–34

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE CEMENT INSTITUTE, ET AL.; AETNA PORTLAND CEMENT COMPANY, ET AL.; MARQUETTE CEMENT MANUFACTURING COMPANY; CALAVERAS CEMENT COMPANY, ET AL.; HURON PORTLAND CEMENT COMPANY; SUPERIOR PORTLAND CEMENT, INC.; NORTHWESTERN PORTLAND CEMENT COMPANY; RIVERSIDE CEMENT COMPANY, A CORPORATION; UNIVERSAL ATLAS CEMENT COMPANY; CALIFORNIA PORTLAND CEMENT COMPANY; MONOLITH PORTLAND CEMENT COMPANY, ET AL.; BLAINE S. SMITH, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 16761) is reported in 157 F. 2d 533.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on October 31, 1946 (R. 16823–16832). Certiorari was applied for on January 20, 1947, and was allowed on March 10, 1947. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, as amended, 52 Stat. 111, 15 U. S. C. 45, under Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U. S. C. 41, and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The following questions relating to respondents' violation of Section 5 of the Federal Trade Commission Act are presented:

(1) Whether a combination among respondents, as charged and found by the Commission, to sell under a multiple basing-point delivered-price system having the effect and purpose of producing identical delivered prices and eliminating price competition among themselves, is an unfair method of competition within the meaning of the Federal Trade Commission Act.

(2) Whether the evidence supports the Commission's findings of the combination charged against respondents.

(3) Whether the findings of the Commission as to combination are sufficiently explicit.

(4) Whether the Commission relied upon incompetent or inadmissible evidence.

(5) Whether the evidence and the findings sufficiently connect all of the respondents with the combination found to exist among them.

The following questions relating to respondents' violation of Section 2 (a) of the Clayton Act are presented:

(1) Whether the various respondents, in selling cement at delivered prices which yield the respective sellers a greater net return on sales in some places than on sales in others, discriminate in price between different purchasers within the meaning of Section 2 (a).

(2) Whether, when the various respondents sold at higher net prices in certain places than in other places, the lower price was made "in good faith" to meet the equally low price of a "competitor" within the meaning of the proviso to Section 2 (b) of the Clayton Act.

(3) Whether respondents' discriminatory prices have an effect on competition which renders them unlawful under Section 2 (a), in that their effect may be "substantially to lessen competition" in the sale of cement and "to injure, destroy or prevent competition" among themselves.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

(a) Unfair methods of competition in commerce, and unfair or deceptive acts or

practices in commerce, are hereby declared unlawful.

* * * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, * * * * * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

Section 2 of the Clayton Act, as amended by the Act of June 19, 1936, commonly called the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

(a) * * * it shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall pre-

vent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

This is a proceeding brought by the Federal Trade Commission under the Federal Trade Commission Act and the Clayton Act, in which the court below set aside the order entered by the Commission. The respondents consist of The Cement Institute, an unincorporated trade association which will be referred to as the Institute,

74 corporate members of the Institute engaged in the manufacture, sale and distribution of cement, which will sometimes be referred to as the respondent producers,[1] and 23 individuals who are officers or trustees of the Institute.

THE FEDERAL TRADE COMMISSION'S COMPLAINT

The complaint of the Commission, which is in two counts, issued in July 1937. The first count charges the respondents with violating Section 5 of the Federal Trade Commission Act and the second charges them with violating Section 2 of the Clayton Act.

Count one alleges that for the last eight years the respondents have maintained a combination among themselves to hinder, restrict, and restrain price competition among respondent producers and that this combination has been made effective by mutual understanding and agreement to employ,

[1] One of the corporations named as a respondent in the Commission's complaint, Castalia Portland Cement Company, was bankrupt at the time the Commission's findings were filed (Fng. 1 (m), R. 15964–5) and the Commission's order closed the case as to it (R. 16137).

Six respondent producers (Colorado Portland Cement Company, Green Bay Cement Company of Pennsylvania, Oklahoma Portland Cement Company, Three Forks Portland Cement Company, Union Portland Cement Company, and Vulcanite Portland Cement Company) do not themselves manufacture cement but each acts as selling agent for an affiliated producer of cement (Fngs. 1 (n), (2a), (2y), (3p), (3r), (3v); R. 15965, 15967, 15972, 15976, 15977, 15978).

and the actual employment of, the methods and practices set forth in paragraphs five to seven of the complaint (R. 48). Paragraph five alleges that the respondent producers have, with respect to practically all of their sales, cooperatively employed a basing-point system of pricing under which cement is sold only at delivered prices and the delivered price which every respondent producer quotes at any given point in the United States is identical with the delivered price quoted by all other respondents which seek business at such point (R. 54–55). Paragraph six gives examples, illustrative of how this pricing system operates, of identical bids actually received by various branches of the Federal government and by a single branch of but one State government (R. 73–79). Paragraph seven alleges that, pursuant to and in support of the combination averred in paragraphs four and five, respondents have employed many and sundry means and have followed various practices, including the following (R. 91): Preparation and distribution of freight rate books (R. 91–93), preventing delivery of cement by trucks (R. 117), preventing diversion of cement while in transit (R. 128), classification of the customers to whom respondent producers will sell direct (R. 144), boycott of dealers who handle imported cement (R. 164), and propaganda designed to camouflage the non-competitive character of the industry (R. 177).

Count two adopts the allegations respecting combination made in count one (R. 218). Count two further alleges that under respondents' pricing formula the true price at which each respondent producer sells cement is the delivered price less the cost of transporting it to destination paid by the seller and that, by reason of their varying true prices to different customers, the respective respondent producers discriminate in price among their customers (R. 223–4). It is alleged that such price discriminations are the product of respondents' combination not to compete with each other in price and that the discriminations have the effect of injuring, destroying, and preventing competition among respondents (R. 241).

THE FINDINGS OF THE COMMISSION

After the taking of evidence before an examiner of the Commission and a hearing before the Commission on exceptions to the examiner's report, the Commission filed detailed findings of fact (R. 15962–16132). The findings incorporate much documentary evidence and other undisputed facts; comparatively few of the findings of specific facts have been challenged by respondents; and the court below rejected as unsupported by evidence only one presently inconsequential finding.[2]

[2] The finding which was rejected (R. 16805–6) is: "In general, dealers and ordinary purchasers are not aware of differences in quality among the brands of cement sold by different producers" (Fng. 20 (h), R. 16108).

The Cement Industry and Respondents' Position Therein

The raw materials and fuel necessary for making cement[3] are found in many parts of the United States and the industry, which first started in Pennsylvania some 70 years ago, has gradually spread until there are now cement plants in at least 35 states. One of the factors contributing to this geographical extension of the industry has been the high cost of transporting cement from place of manufacture to place of use. Transportation costs generally constitute a substantial part of the delivered cost, freight charges of 30¢ to 60¢ a barrel being quite usual and charges approximating $1.00 per barrel not uncommon.[4] (Fng. 3 (a), R. 15980.)

Cement has a wide range of uses, particularly for construction work, public projects, and general building, and shipments averaged about 115,000,000 barrels annually in the period 1928–1937. Producers customarily market cement by

[3] Cement is produced by heating proper proportions of calcareous materials (meaning anything containing abundance of lime) and argillaceous materials (meaning chemical materials such as silica and alumina) until fused into "clinkers", which are then ground, with the addition of gypsum or calcium sulphate, to a fine powder commonly called cement. (R. 6679, 6683–4; Fng. 3 (a), R. 15980).

[4] Examples of bids at identical prices set forth in the findings show delivered prices ranging from $2.02 to $3.286854 per barrel (Fng. 9 (b), R. 16023–7). These figures, when compared with the range of freight charges referred to above, give some indication of the proportion of delivered price represented by transportation charges.

selling it to dealers for resale, to processors who sell ready-mixed cement, to manufacturers of cement products, to contractors for use in construction, to railroad and other large commercial users, and to governmental agencies. In periods of normal business, sales to dealers represent the most important sales outlet. (Fngs. 3 (b), (c), R. 15980–1.)

There are approximately 80 producers of cement in the United States and they operate a total of some 150 mills (Fng. 3 (a), R. 15980). Forty-nine of these mills, which have a productive capacity in excess of one-third of the total national capacity, are operated by five of the respondent producers, and these five respondents and five others control more than one-half of the total productive capacity (Fng. 4 (a), R. 15981–2). There are also substantial interrelationships among a number of the other respondent producers (Fng. 4 (b), R. 15982). This concentration of control of a large proportion of the industry in relatively few hands has aided in creating and maintaining unity of purpose among respondents (Fng. 4 (c), R. 15982).

For a long period of time cement producers have been organized in national and regional trade associations (Fng. 5, R. 15983). The Portland Cement Manufacturers Association, organized in 1902, grew in size and strength until its membership at one time included substantially

all domestic producers (*ibid.*). Another association, which was organized in 1916, remained active until shortly before the decision of this Court in *Cement Manufacturers Assn.* v. *United States,* 268 U. S. 588 (*ibid.*). The Institute, which was organized in August 1929 for the promotion of the mutual interest of its members, has functioned since then through officers, trustees, committees, divisions, bureaus, and other agents (Fng. 1 (a), R. 15962). It has been an effective vehicle for formulating and executing collective plans and purposes (Fng. 4 (c), R. 15982) and at the time the complaint in this case was issued practically all domestic producers of cement were members of the Institute (Fng. 1 (a), R. 15962).

Absence of Competition in the Industry

Available records of cooperative activity disclose that the cement industry has long evinced a strong aversion to competition and that its members have, by understandings and agreements, developed and maintained substantial uniformity of action with respect to practically every marketing procedure involving price or other competition. Some of the current practices of the industry, designated by respondents as "customs of the trade," originated in agreements two or three decades ago and have persisted, with the support of collective action, in substantially their original

form. Other practices having similar origin have been modified or extended by collective action. The long-pursued restraints of competition have fostered the belief now generally held by respondents that competition is impracticable in the cement industry and that no producer should seek to excel others in quality, price, or terms of sale. (Fngs. 6 (a), (b), R. 15983–4.)

Cement is customarily sold by respondents without substantial competition in quality, price, or terms and conditions of sale, but upon the basis of service, entertainment to the buyer and personal relationships (Fng. 6 (c), R. 15987). Since the organization of the Institute, uniformity in price and terms of sale has been continuously maintained, with exceptions induced by particular conditions in localized areas or by economic depression, by all manufacturers offering cement at any given location (*ibid.*). An examination of invoices covering actual sales of cement made in April 1938 in some 250 widely scattered communities shows an extremely high degree of uniformity in the delivered prices of cement at each delivery point by all respondents who made sales there (Fng. 9 (a), R. 16023). In general, the commercial delivered prices of all respondents making sales of cement at any given location have been identical (*ibid.*).

The identity of delivered prices is best illustrated by sealed bids made to public agencies.

Sixteen respondents and two other sellers each bid $2.43 per barrel on cement for the Navy Department at Brooklyn. Fifteen respondents each submitted to the United States Engineers Office a bid of $2,772 for 1,200 barrels of cement for delivery f. o. b. Monroe, Louisiana, and 14 respondents each bid $3,060 for the same cement f. o. b. local switch Missouri Pacific Railroad at Monroe. Bids for cement for the United States Industrial Reformatory at Chillicothe, Ohio, were submitted by 14 respondents. The price bid by each was $2.02 per barrel. The Tennessee Valley Authority received bids from 11 respondents on cement for delivery at Wheeler Dam, to the Wheeler Dam Authority, and at Sheffield, Alabama. The price per barrel bid by each of the 11 respondents was identical for each respective delivery, namely, $1.8798, $1.8398, and $1.7008. Bids were received from 11 respondents for cement for delivery to the United States Engineers at Tucumcari, New Mexico. The price named in each bid was $3.28685 per barrel. For cement for the United States Penitentiary at Leavenworth, Kansas, bids were received from eight respondents. Seven of them bid $2.163424 and one bid $2.17528, per barrel. (Fng. 9 (b), R. 16023–7.)

There was the same identity in delivered prices on bids submitted to state authorities. Among instances of this kind found by the Commission,

two may be mentioned. Nine respondents submitted bids to the Louisiana Highway Commission on cement for delivery at 70 different destinations. The bids of all nine respondents were identical at each destination except that one bid was higher than the others at three destinations. Upon request of the Illinois Highway Commission for bids for delivery at 102 different destinations, six respondents bid at all destinations, one at 71, one at 56, and one at 35. All of the bids received at each of 98 destinations were identical; one respondent was higher than the others at one destination; and one respondent was higher at two destinations and lower at one than the others.[5] (Fng. 9 (c), R. 16028).

[5] As a result of the identical bids submitted to the State of Illinois, the Governor of Illinois made charges of collusion among cement manufacturers (Fng. 21 (b), R. 16108). In correspondence concerning a proposed campaign of publicity by the industry to counteract these charges, the president of one respondent wrote to an officer of the Portland Cement Association:

"Moreover the reader is bound to cast a skeptical eye at the argument presented * * * when in your opening remarks you freely admit that the very mill price that we contend will bring chaos to the industry is not only in existence but in actual use." (*Idem.*, R. 16110.)

The reply to this letter states in part:

"Public curiosity has been aroused to an extent where unquestionably, we must satisfy it or expect bitter consequences. * * *

"* * * Isn't it more or less to be expected that a newly elected governor * * * might be confounded by the riddle of how he can get a dozen bids listing identical quotations at 102 destinations, except by collusion?" (*Ibid.*)

When a respondent, by miscalculation or mistake, submitted a bid lower than others, he would sometimes seek to correct or withdraw his bid, and occasionally a bid higher than the identical bids of others was submitted by a respondent who did not wish to sell at the particular location but wished to retain his name on the list of bidders (Fng. 9 (d), R. 16028).

At least since 1913 the productive capacity of the industry has been substantially in excess of total consumption. In 1928, th year of largest consumption, productive capacity exceeded consumption by about 25% and for the years 1931 to 1937, inclusive, consumption represented less than half of productive capacity. In 1932 and 1933, at a time when consumption of cement amounted to less than 30% of capacity and had been rapidly declining during the then existing depression, respondents made numerous and substantial advances in their prices. Many of the base prices established during the series of advances which ended early in 1933 were still in effect in 1938. With but a few exceptions, only minor readjustments in other base prices have been made since early in 1933. Cement prices have shown a high degree of rigidity. (Fngs. 23 (d), (e), R. 16126–7.)

The recognized principle of economics that uniformity of price tends to result from free competition in the case of a standardized commodity

sold to well-informed buyers, does not serve to explain the identical delivered prices at which respondents sell and offer for sale their cement. This principle has no application to identical prices in sealed bids and cannot explain such price identity. When—as in the sale of cement—the price is established by the seller, the price leadership of the governing base mill is invariably accepted by other sellers, and there is no bargaining between buyers and sellers, prices are not the result of market action in a true economic sense but are the product of a non-competitive or monopolistic price structure.[6] (Fng. 22 (c), R. 16123–4.)

Respondents' Multiple Basing-Point Delivered Price System

The phenomenon of identical prices at any given place results from the pricing system used by respondents. The system is one whereby sales are at a delivered price and the price quoted at any particular place is the lowest price obtained by adding together the base price of any mill and its all-rail freight rate from basing point to delivery point. At every point at which the base price of Mill X plus its freight rate thereto is the lowest combination of base price and freight rate, Mill X is the "governing" base and determines the

[6] Many of respondents' sales, i. e., those involving absorption of large freight charges, have the characteristics of "dumping" (Fng. 22 (c), R. 16123).

delivered price at which all respondent producers sell. But at every location where the base price plus freight rate of another mill is lower, Mill X adopts as its delivered price the lowest combination of these items. The net realization of a base mill is therefore always greater when it sells in the area in which it is the governing base than when it sells elsewhere; the net return from the former sales is the mill's base price, but from the latter sales the net return, because of transportation costs which the producer-seller assumes, is always less than this. (Fng. 7 (a), R. 15988.)

Approximately half of the mills operated by the respondent producers have base prices and are known as base mills (Fng. 7 (b), R. 15988).[7] The other mills, which have no base prices, are known as non-base mills. These mills use the same pricing system, namely, they sell only at a delivered price and this price is, at every location, the lowest combination of the base price plus freight rate of a base mill (Fng. 7 (c), R. 15989). A non-base mill may become a base mill or a base

[7] The court below quoted in its opinion certain statements from the Institute's brief, which the court said that the Commission had not denied, as to the number of mills east of the Pacific Coast which were base mills or located within 50 miles of a base mill and as to their percentage of total productive capacity (R. 16787–8). The Commission's brief below did sharply challenge the ground upon which the Institute had placed in the same category base mills and non-base mills located within a 50-mile radius. The facts set forth in the Institute's reply brief below (footnote, pp. 26–27) support the validity of the Commission's challenge.

mill become a non-base mill as its management may decide and the number and identity of base and non-base mills therefore change from time to time (Fng. 7 (b), R. 15989).[8]

There is the same determination of delivered price by reference to the governing base price when the base price has unusual or arbitrary characteristics. In some instances a base is a dual one in the sense that it simultaneously maintains two base prices, each applicable in a different territory. Thus there was one base with a lower base price for places north of the Virginia-North Carolina line than its base price for places south of that line. Sometimes the application of the base price is limited to certain territory, thereby excluding part of the territory as to which it would normally be the governing base. In the case of certain adjoining bases a consistent relationship between their prices might be maintained for years; the Hudson Valley base was for years maintained at 10¢ above the Lehigh Valley base.[9] (Fng. 7 (e), R. 15989.)

Successful operation of respondents' pricing formula does not require exchange of information

[8] When such a change occurs, there would be a change in the governing base for certain points, but all respondents selling at any such point would, after the change as before, simultaneously offer an identical delivered price.

[9] The 10¢ differential referred to in this finding is 10¢ per barrel (R. 7297, 7303–4).

concerning base prices or changes in such prices.[10] When a respondent producer makes a change in its base price it usually sends written notice of the change to all of its customers and, through common customers and salesmen in the field, other respondent producers selling in the area affected by the change learn of it almost immediately.[11] (Fng. 9 (e), R. 16029.)

Application of respondents' pricing formula inevitably results in identical prices for cement at any given location by all sellers using it. It is plain that this formula, once put into operation, is self-perpetuating in the sense that renewed understandings are not needed to maintain identical delivered prices. The formula was not evolved and put into operation at one stroke, but came into existence and was extended from time to time as a result of understandings and agreements in the industry.[12] (Fng. 7 (h), R. 15991–2.)

---

[10] Except during the NRA Code period and some seven months afterwards, and except for limited direct exchanges among certain respondents not shown to have been made under the Institute's auspices, there has been no systematic exchange of such information among respondents (Fng. 9 (e), R. 16028–9).

[11] Notices of price increases are usually sent to customers five days in advance of the effective date of the increase; likewise, in the case of a decrease, customers are usually given the benefit of the decrease on all shipments made during the five preceding days (Fng. 9 (e), R. 16029).

[12] As to the development, spread and maintenance of respondents' multiple basing-point, delivered-price system and the understandings and agreements among members of the industry relating thereto, see Findings (7 (h)–(r), R. 15992–16006.

When the Institute was formed in August 1929, the multiple basing-point, delivered-price system of pricing was one of the customs of the industry which the Institute was organized to maintain (Fng. 7 (o), R. 16000).

Collective Action to Prevent Competition and to Maintain Respondents' Pricing System

The respondents have taken collective action as to various practices with the effect and purpose of preventing any price competition in the cement industry and of assuring that respondents' pricing system bring about identity in their delivered prices under any and all circumstances. The applicable findings of the Commission will be comprehensively discussed under Point I of the Government's argument (*infra,* pp. 69–80). At this point, therefore, we shall merely summarize the collective and concerted action taken by respondents to implement the non-competitive regime and its allied pricing system which they maintained. The action thus taken includes the following:

(1) Compilation and publication of rate books in order to assure that all producers use common freight factors for pricing purposes, and use of the rates thus published even though they do not correspond to the actual railroad freight charge and even though actual shipment is by water or by motor truck (Fngs. 8 (a)–(g), R. 16006–13).

(2) Adoption of various devices to prevent differences in delivered prices arising, because of

lack of information concerning federal land grant rates, on sales to the Federal Government (Fngs. 8 (h)–(o), R. 16013–22).

(3) Establishment of involuntary or punitive bases, i. e., the establishment by a producer of a low base price at the mill of some other producer who has not adhered to the accepted pricing formula (Fng. 10, R. 16029–45).

(4) Action to eliminate, discourage, and control the trucking of cement by purchasers, because of its destructive effect upon the delivered price system (Fng. 11, R. 16045–55).

(5) Action, taken for the same reason, to prevent purchasers from diverting cement while in transit (Fng. 12, R. 16055–9).

(6) Action, having a like objective, to police the carrying out of "specific job contracts" (Fng. 13, R. 16059–65).

(7) Establishment and maintenance of uniform terms and conditions of sale (Fng. 14, R. 16065–71).

(8) Establishment of uniform practices as to sales to dealers, the definition of dealers, and the types of business they should be permitted to handle (Fng. 17, R. 16089–99).

(9) Action to prevent or restrict direct sales by producers to federal agencies (Fng. 18, R. 16099–16102).

(10) Boycott of dealers who handle imported cement (Fng. 19, R. 16102–4).

Concerted action was also taken which, while it had no immediate impact upon price competition or respondents' pricing system, was designed to maintain underlying conditions in the industry favorable to high and noncompetitive prices. The following action of this nature was taken:

(1) Exchange of detailed statistical information having as its purpose limitation of production by each mill upon the basis of that proportion of the total available business which its prior production or its productive capacity bore to prior total production or to total productive capacity of the industry (Fng. 15, R. 16071–82).

(2) Organized opposition to construction of additional productive capacity and to the entrance into the industry of new competitors (Fng. 16, R. 16082–9).

(3) Collective action to establish minimum specifications for cement and to publicize the view that it is a completely standardized product (Fng. 20, R. 16104–8).

(4) Concerted undertakings designed to offset criticism of the industry because of its noncompetitive character and practices (Fng. 21, R. 16108–22).

Effects of Respondents' Combination

The combination maintained by respondents and their practices thereunder restrain and suppress competition in the sale of cement; deprive purchasers of the benefits of competition in price;

maintain artificial and monopolistic methods and prices in the sale and distribution of cement; require purchases to be made on a delivered price basis and deny to purchasers the benefits of transportation of cement by motor truck or water carrier; frequently deprive agencies of the Federal Government of all or a part of the benefits of the lower land-grant rates available to them and require them to purchase through dealers at higher prices than those available on direct purchases from the producer; maintain uniform terms and conditions of sale; obstruct the sale of imported cement; and otherwise maintain respondents' multiple basing-point, delivered-price system and obstruct and defeat any form of competition which threatens the continued use of this system and the uniformity of prices which its use entails. (Fng. 26, R. 16131–2.)

Respondents' pricing system results in much cross hauling of cement (Fng. 23 (c), R. 16126).[13] A further consequence is that the advantage of sales in a producer's home territory is waived in return for reciprocal waivers by the other respondent producers (*ibid.*).[14] The system thus

[13] A statistician of the Institute estimated that the "probable freight loss" due to cross hauling in one year in two districts was over $783,000, an estimate which the Commission found to be a material understatement of the loss in question (Fng. 23 (c), R. 16126).

[14] In selling at delivered prices, a producer's costs are lowest (because the freight charge is least) on sales in places relatively near the mill. Since such sales bring the producer the greatest net realization, they are most advantageous to him.

tends to force base prices to a level sufficiently high to permit the individual respondent producers to sell outside the territory naturally tributary to their respective mills (*ibid.*).[15]

Violation of Section 2 of the Clayton Act

The true prices at which the respondent producers sell cement are their delivered prices less the actual freight charges paid for transportation of the cement from point of production to point of delivery. Respondent producers accordingly sell at almost as many different true prices as the number of their customers' locations. These price differences range from a fraction of a cent to amounts substantially in excess of $1.00 a barrel and commonly amount to 25¢ to 50¢ per barrel. (Fngs. 24 (a), (b), R. 16127–8.)

The foregoing price discriminations are the result of respondents' combination to use the multiple basing-point, delivered-price system (Fngs. 24 (a), (b), R. 16127–8). The effect of such discriminations has been and may be substantially to lessen competition and tend to create

[15] Typical of the practices of the respondent producers are the sales made by five mills in a period covering four months selected for study (Fng. 23 (b), R. 16125). The net realization was *less than* the mill's base price by the following maximum amounts: for one mill, 40¢ to 45¢; for one, 55¢ to 60¢; for one, 60¢ to 65¢; and for two, over 70¢ (*ibid.*). On over 50% of all sales the net realization was more than 30¢ below the mill's base price in one case (Penn-Dixie) and more than 35¢ below in another case (Lone Star) (*ibid.*).

a monopoly in the sale of cement, and to injure, destroy, and prevent competition among the respondent producers (Fng. 25, R. 16131). And the use of the multiple basing-point, delivered-price system for the purpose and with the effect of producing identical delivered prices at any given destination and thereby avoiding price competition precludes the defense that the variations in the true prices of the respective respondent producers were made in good faith to meet an equally low price of a competitor (Fng. 24 (d), R. 16129).

THE COMMISSION'S CONCLUSION AND ORDER

The Commission concluded that the acts and practices set forth in its findings constitute unfair methods of competition prohibited by the Federal Trade Commission Act and price discriminations prohibited by Section 2 (a) of the Clayton Act (R. 16132).

The order issued by the Commission directs respondents to cease and desist, in connection with interstate sales of cement, from participating in "any planned common course of action," understanding, agreement, or conspiracy—

(1) To quote or sell cement at prices determined pursuant to the multiple basing-point delivered-price system or pursuant to any other system which results in identical prices or price quotations by those using the system;

(2) To perform or engage in certain specified acts or practices in aid or support of any plan or system prohibited by paragraph (1) above.

(3) To discriminate in price between customers by systematically charging "mill net prices" which differ by the amounts necessary to produce delivered prices to purchasers identical with the delivered prices available to the same purchasers on purchases from other respondents;

(4) To use any means substantially similar to those set out in the order with the purpose or effect of accomplishing anything prohibited by the order (R. 16133–16137).

THE DECISION OF THE CIRCUIT COURT OF APPEALS

On petitions to review the Commission's order (R. 16138–16232), the Circuit Court of Appeals for the Seventh Circuit, composed of Evans, Major and Kerner, JJ., heard the cases together, and on September 20, 1946, rendered an opinion holding the Commission's order to be void in its entirety (R. 16761–16816). Judge Evans, dissenting, was of the opinion that the order should be affirmed (R. 16816–21).[16]

The opinion of Judge Major for the court below is severely critical of the reasoning of the

[16] The dissent notes that if the evidence fails to show that one or more of the respondents is a party to the combination found by the Commission the order should be modified so as not to apply to such respondent or respondents (R. 16821).

Commission,[17] the assumed objectives of the Commission, and the assumed effects of its order.[18] But the court, as previously stated (*supra*, p. 8), rejected as unsupported by evidence only one minor finding of the Commission's numerous and detailed findings of fact.

The lengthy opinion of the court below does not clearly state the grounds upon which it set aside the Commission's order. It appears that the principal grounds of decision are: (1) The Commission did not find with sufficient definiteness that the respondents had agreed or combined to sell under the multiple basing-point, delivered-price system and that, even if such a finding can be spelled out of the findings which were made, it was predicated to an undisclosed extent upon incompetent or irrelevant evidence; and (2) the findings and evidence as to the concerted action taken by respondents to prevent practices which might in any respect impair the functioning of their delivered-price system did not warrant the

[17] As to the arguments or reasoning of the Commission, the court uses such expressions as "the most illogical of all," one which the court is "unable to comprehend," "another exaggerated contention," "borders on the absurd" (R. 16792, 16798, 16805). Reliance by the Commission on activities of the respondents during the N. I. R. A. period, the court said, "would constitute a fraud, or perhaps confidence game would be a more appropriate designation" (R. 16779).

[18] As to the assumed purposes of the Commission, see R. 16768–9. As to the assumed effects of the order, see R. 16791–2, 16794, 16815.

Commission in inferring that respondents had agreed and combined to employ or maintain this pricing system. The provisions of the order relating to Section 2 (a) of the Clayton Act were apparently set aside upon the ground that the Commission erred in finding that respondents were not within the proviso of Section 2 (b) of the Clayton Act, which permits a seller to rebut a prima facie case of price discrimination by showing that his lower price was made in good faith to meet the equally low price of a competitor.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the Commission did not find that respondents have been parties to a combination to restrict competition by various means and methods and particularly by mutually agreeing to sell cement solely at delivered prices under a multiple basing-point system of pricing.

2. In holding that the findings of the Commission that respondents had acted collectively to eliminate or prevent practices which might impair the functioning of their multiple basing-point delivered-price system of selling cement are not sufficient to support a finding that respondents had agreed and combined to sell cement under this system.

3. In holding that if there are adequate findings of combination, they are not supported by the evidence.

4. In substituting for findings of the Commission the court's own judgment as to the facts established by the evidence and as to the inferences properly to be drawn from the evidence.

5. In holding that the Commission had given improper consideration to evidence respecting agreements and activities of respondents prior to the organization of the Institute.

6. In holding that the Commission had given improper consideration to evidence respecting acts and practices of respondents during the period in which the National Industrial Recovery Act was in effect.

7. In holding incompetent the letter referred to in findings 7 (r) and 21 (f).

8. In holding that the Commission erred in concluding that each of the corporate respondents sold cement to its customers at discriminatory prices violative of Section 2 (a) of the Clayton Act.

9. In holding that the Commission erred in finding that respondents' discriminatory prices were not within the proviso to Section 2 (b) of the Clayton Act.

10. In vacating and setting aside the Commission's order.

SUMMARY OF ARGUMENT

I

A. It is established that the prohibitions of the Federal Trade Commission Act apply to acts and

practices which violate the Sherman Act, and that a combination among the members of an industry to eliminate price competition among themselves is a price-fixing agreement illegal *per se* under the Sherman Act. The decisions of this Court also indicate that the Federal Trade Commission Act empowers the Commission to prohibit practices which operate to suppress competition, regardless of whether or not the parties engaging in such practices have acted in combination or by agreement.

B. Substantially all sales of respondent producers are at a delivered price, so computed that excluding errors in the application of their pricing formula (or occasional deliberate overpricing by a bidder not really wishing to become a successful bidder), their prices at any given point of delivery are identical. Under this system of selling there is and can be no competition in price among respondent producers. The absence of competition among them extended, moreover, beyond price; terms of sale were likewise identical. The essentially non-competitive character of the industry has, in certain instances, been recognized and avowed by leading members of the industry.

C. In determining whether there is evidence to support a finding of combination by the Federal Trade Commission, the established rule that a combination in restraint of trade may be "inferred from the things actually done" or "found in a course of dealing or other circumstances" is

applicable. In addition, inferences of fact which the Commission "reasonably" draws from the evidence are to be accepted. The evidence of identity of respondents' prices in innumerable sealed bids to governmental agencies would, if all other proof were lacking, fully support the inference that there was joint understanding, purpose, and plan on the part of respondents not to compete in price and mutually to use a pricing formula producing identity in their delivered prices. Indeed, under the holding in *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, it would seem that combination is to be inferred as a matter of law from the acts of the respondents. The Commission also had before it a wealth of other evidence from which inference of combination could reasonably be drawn.

D. It was clearly the intention and understanding of the Commission that its findings should and did set forth combination among respondents to suppress competition in price and to sell cement under respondents' multiple basing-point delivered-price system. Under ordinary rules of construction, any ambiguity in the findings should be resolved in favor of the meaning manifestly intended by the body which framed them. The Commission made general findings that the respondents had acted in combination in the manner charged in the Commission's complaint. The Commission, in addition, made nu-

merous findings that respondents had acted collectively to regulate or stamp out practices which might lead to price competition or which might impair the price uniformity contemplated and resulting from their multiple basing-point delivered-price system. These were findings that the respondents acted in combination to maintain a noncompetitive pricing system.

E. The history and development of trade practices in the cement industry, as well as the question of combination among respondents during the years 1929–1937, were in issue before the Commission. Evidence concerning respondents' activities during the period in which the National Industrial Recovery Act was in effect was obviously relevant. The Commission did not infringe the spirit or the letter of the exemption from the antitrust laws which that Act conferred in respect of any code of fair competition approved under the Act. No finding of combination was grounded upon the respondents' observance of the provisions of such an approved code. All that the Commission did was to look to their conduct during the effective period of this Act for the light which it might throw upon their prior and subsequent acts. It is established that evidence of this nature may be given consideration. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 46–47.

The Commission also did not improperly receive in evidence a letter written by a deceased official

of the Institute—one of its trustees and chairman of its marketing research committee—to another Institute official protesting the industry's unqualified rejection of a request by the President of the United States that producers quote f. o. b. mill prices. The view there expressed that this industry is one "that can not stand free competition, that must systematically restrain competition or be ruined" and that arguments otherwise picturing its pricing practices are "sheer bunk and hypocrisy," although in the nature of opinion evidence, was relevant to the issues before the Commission; and, under familiar principles governing admissibility of evidence before administrative bodies, there could be no objection to the Commission's admission of this letter for such evidentiary value as it possessed.

F. The statutory requirement that the Commission make "findings as to the facts" did not compel the Commission to set forth the character and extent of the participation of each of the respondents in their over-all combination, and the findings are not defective because of inadequate specification in this respect. The contention of certain respondents that the evidence fails to connect them with any over-all combination also must, we submit, fail. The proof that these respondents were members of the Institute and that their pricing practices did not vary significantly from the established pricing pattern of the others adequately supports a finding of their participa-

tion in the combination. Other evidence also warranted the inference that these respondents had joined in and helped to promote respondents' noncompetitive pricing system.

II

A. The price discriminations prohibited by Section 2 (a) of the Clayton Act include those resulting from sales at different delivered prices to customers in different localities where the variation in price is due to either systematic collection by the seller of phantom (unearned) freight or his systematic absorption of freight charges. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726. Under this decision and under the proof in this case, the Commission's findings that there was a wide range in the mill net realized by respondents from sales in different localities and that such varying mill net prices constituted illegal price discriminations are clearly correct. The delivered price at which respondents sold represented the price of the product plus cost of transportation to place of delivery and, in order to arrive at true sales price, the cost of transportation must be stripped from "delivered price." The Commission's finding that it is a respondent's actual realization, i. e., his mill net, which is his true sales price accords with respondents' accounting practices and with their practice of having the purchaser pay the freight

charge and remit only the balance of the invoiced (delivered) price to the seller.

B. The court below recognized that sales by non-base mills at prices which result in collection of phantom freight were sales at discriminatory prices, but it concluded nevertheless that when a base mill absorbs freight, its lower price "was made in good faith to meet an equally low price of a competitor," within the justification of price discrimination permitted by Section 2 (b). But whether a discriminatory price is made in a good-faith endeavor to meet a competitor's price is a question of fact for determination by the Commission (*Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746), and the Commission has determined this fact adversely to respondents. We submit that there is clear warrant for this finding. Only under a tortured construction of the statute could it be said that prices which are the product of agreement to suppress competition in price are made "in good faith" to meet competitive prices. In addition, the systematized method of pricing used by respondents is not the kind of meeting of a competitor's price to which Section 2 (b) applies.

C. There was, in the case of respondents' discriminatory prices, the effect on competition which makes the discrimination unlawful. The statute by its express terms forbids discriminations the effect of which may be to injure or destroy com-

petition with the person who "grants" the discrimination, that is, the seller. Where, as here, a system of selling at discriminatory prices produces identity in the prices of sellers and thus eliminates competition among them, it would seem to be beyond question, as the Commission has found, that the effect both may be and is to injure and destroy competition among sellers of the product.

III

The Commission's order prohibits respondents from participating in any "planned common course of action, understanding, agreement, combination, or conspiracy" to do certain specified things. It is only when there is a conjunction of such "planned common course of action," etc., and the doing of something against which the order runs that there can be a violation of its requirements. The court below plainly misinterpreted the order in construing it as prohibiting freight absorption under any and all circumstances and as requiring that all sales be on an f. o. b. mill basis. And, because of this misconception, the court erroneously concluded that the effect of the order would be to give to each producer a "local monopoly" in his home territory. Moreover, to the extent that, because of restrictions imposed by the order, each respondent producer concentrates his sales in the area in which he has a freight advantage, this will not lead, as

the court below believed, to an increase in unit cost of production. On the other hand, sales principally within the area tributary to the mill will largely eliminate the wasteful cross-hauling which is a by-product of respondents' present pricing system, the cost of which ultimately falls upon consumers of cement.

ARGUMENT

I

UPON THE FINDINGS AND EVIDENCE, THE COMMISSION'S DETERMINATION THAT THE RESPONDENTS HAVE VIOLATED SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT IS VALID

The major issue respecting respondents' violation of the Federal Trade Commission Act is the adequacy of the Commission's findings that they combined to restrain price competition among themselves and to use a pricing system making for identity in the delivered prices of all respondent producers at any given location in the United States. We believe, however, that the Court will be aided in its consideration of this issue if we first set forth the Government's views on certain preliminary questions. One of these is the application of the prohibitions of the Federal Trade Commission Act to practices of the kind with which the respondents are charged. A second preliminary question is whether the system of

pricing cement used by respondent producers in fact eliminates price competition among them, irrespective of whether or not there is combination or implied agreement on their part not to compete in price and to use this pricing system. A third preliminary question is whether there is evidence sufficient to support the finding of such combination and agreement.

A. *The Acts and Practices with which the Respondents Stand Charged are within the Prohibitions of the Federal Trade Commission Act*

It is settled that practices which are unlawful under the Sherman Act constitute "unfair" methods of competition within the meaning of the Federal Trade Commission Act. "The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed." *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 310. The Sherman Act "shows a declaration of public policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress." *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 453. If the purpose and practice of a combination "runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of

competition". *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 463. It was "the object of the Federal Trade Commission Act to reach not merely in their fruition but also in their incipiency" practices which may lead to restraints of trade condemned by the Sherman Act (*idem.*, p. 466).

We take it to be almost axiomatic that the Sherman Act renders unlawful a combination or agreement among the members of an industry to eliminate price competition among themselves, effectuated by agreement or understanding to sell on a delivered price basis and to compute delivered price in such fashion that at any given point sellers' prices are identical.[19] As is pointed out later (*infra*, p. 43), the essence of respondents' pricing system was a formula which designated the price leader for any and every point in the United States and provided that all others should adopt as their own the price of the price leader. This was price fixing in its most virulent, because most comprehensive, form. Prices were fixed within the meaning of the prohibitions of the Sherman Act both because they involved "establishment of uniform prices" and because the basis of their computation was "agreed upon". *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150,

[19] It was held as early as 1899 that a combination or agreement not to compete in price violates the Sherman Act. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211.

222. "The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal [under the Sherman Act] as the fixing of prices by direct, joint action". *United States* v. *Masonite Corp.*, 316 U. S. 265, 276.

Much less direct "tampering with price structures" by combination than that with which the present respondents are charged violates the Sherman Act. In the *Socony-Vacuum* case, joining in a program to purchase gasoline which producers could not readily dispose of at the current spot market price, for the purpose of thereby maintaining or increasing gasoline prices, was held to be a price-fixing agreement illegal *per se* under the Act. *Cement Mfrs. Assn.* v. *United States*, 268 U. S. 588, to which the court below made repeated reference, is irrelevant in the present connection. There, as this Court was careful to assert (pp. 592, 605, 606), the Government did not either charge or rely upon agreement or understanding among the defendants for price maintenance or price uniformity.

Under this Court's interpretation of the Federal Trade Commission Act (see *supra*, pp. 38–39), it would seem that the Commission is empowered to prohibit practices which operate to suppress competition regardless of whether or not the parties engaging in such practices have combined and agreed so to do. This, indeed, appears to be

the ground of decision both in *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, and in the affirmance of one part of the order of the Commission involved in *Federal Trade Commission* v. *Pacific States Paper Ass'n*, 273 U. S. 52.[20] We do not, however, press this view since we believe that the Commission's order can be sustained on more clearly settled grounds.

---

[20] As to the *Pacific Paper* case, see pp. 60–61 dealing with paragraph (b) of the Commission's order and paragraph 26 of the Commission's findings (Record in that case, pp. 202–203).

In the *Beech-Nut* case the company sold its products to those distributors, and to those distributors only, who were willing to, and did, resell at the resale prices suggested by Beech-Nut and who likewise refused to resell to wholesalers and retailers who failed to observe Beech-Nut's suggested resale prices. Beech-Nut also maintained card records of thousands of distributors, on which some were listed as "selected" distributors and others classified as "Undesirable—Price Cutters," and it notified distributors of changes in classification. This Court said (p. 455) that from this course of conduct the conclusion is inescapable that "competition among retail distributors is practically suppressed." The findings by the Commission that the company's merchandising conduct did not constitute a contract or contracts to fix and enforce resale prices were held not to invalidate its order since the methods by which Beech-Nut secured the cooperation of its distributors and customers in suppressing freedom of competition "are quite as effective as agreements express or implied intended to accomplish the same purpose." And the Court said (p. 454) that if Beech-Nut's merchandising plan "is against public policy because of its 'dangerous tendency unduly to hinder competition or create monopoly,' it was within the power of the Commission to make an order forbidding its continuation."

B. *Under the Multiple Basing-Point Delivered-Price System Used by Respondent Producers, There Is No Price Competition Among Them*

The Commission has found that "substantially all" sales of cement by respondent producers are made at a delivered price and that this price is determined according to a formula which, excluding errors in its application, inevitably results in identity, at any given location, in the delivered price of all respondent producers who there offer cement for sale (Fngs. 7 (a), (h), R. 15988, 15991). These findings are not, as we understand, seriously challenged.[21] The manner in which respondents' pricing formula operates may be described as follows:

For every point in the United States there is some governing base mill. The delivered price at every place within the area which a base mill governs is the base price of that mill plus the all-rail freight rate from the mill to the particular destination. The delivered price so computed is the price which is quoted not only by the governing base mill but also by every other re-

[21] Certain respondents located (with one exception) on the Pacific Coast contend that they do not use the multiple basing-point, delivered-price system set forth in the Commission's findings. This, however, is not a challenge of the Commission's findings concerning the pricing system used by the other respondent producers. For discussion of the alleged non-use of this system by certain respondents, see *infra*, pp. 99–103.

spondent producer interested in doing business there. As the distance from a base mill increases, sooner or later a point is reached where its base price plus freight rate therefrom becomes higher than the base price plus freight rate of some other mill. This circumstance automatically makes the latter mill the governing base. Its base price plus freight rate then establishes the delivered price which is quoted by it and by all other respondent producers who wish to sell at such point.

If, as is true in the cement industry, the sellers know each other's base prices and all applicable freight rates,[22] it is a simple matter to determine, for any given point, the delivered price produced by application of this pricing formula. In effect, there is for every locality an ascertained price leader. Since the formula serves to identify, as to any particular place, both the price leader and his price, all that is further necessary in order for all to sell at identical prices is that the respective respondent producers adopt in each locality the delivered price of the price leader as their own delivered price.

Obviously, no real competition in price exists when goods are thus sold and offered for sale at an identical delivered price at any location in the United States. A purchaser may be required to pay the same price to Mill A, situated around

[22] Findings 8 (e)–(g), 9 (c); R. 16011–3, R. 16029.

the corner, as to Mill B, located many miles away. A buyer, faced with this situation, might just as well determine who should get his business by drawing lots. This, indeed, was the practice followed by the Procurement Division of the Treasury Department.[21] But while the absence of price competition among respondent producers is most strikingly exemplified in the case of bids to public agencies (see *supra*, pp. 12–15), cement was sold to commercial buyers, not upon the basis of competition in price or terms of sale, but upon the basis of service, entertainment of the buyer, and personal relationships (Fng. 6 (c), R. 15987).

The absence of competition is particularly manifest in the case of the non-base mill. In effect, it advises other producers that they may fix its selling prices. Even at the mill location it sells at the base price of some other mill plus the freight rate from such mill to the non-base mill's location. When a mill thus adopts the prices of others as its own prices, it wholly eliminates itself as a competitive factor as far as price is concerned, and its adoption of prices fixed by others enables it to collect phantom freight on many of its sales.

[21] Admiral Peoples, Director of the Procurement Division, testified that out of 17,500 orders for cement issued by agencies of the federal government during a six-months period in 1938, "it is estimated that at least 95 percent were placed on contracts as a result of awards made by lot from identical bidding—as a result of identical bidding at delivered destination prices" (R. 3708).

Federal Trade Commission v. *Staley Mfg. Co.*, 324 U. S. 746, 754.

The absence of competition extended beyond price; terms of sale were likewise identical. The charge made by respondents of 15¢ per barrel for packaging cement in paper bags and their charge of 40¢ per barrel for packaging cement in cloth bags have continued unchanged for more than 35 years (Fng. 14 (g), R. 16071). There was likewise uniformity in the discount of 10¢ per barrel which was allowed for payment in 15 days (see Fng. 9 (b), R. 16025–7). The Code of Ethics adopted when the Institute was organized and agreed to by its members, prohibited, among other things, payment by the producer of the cost of testing cement for a purchaser; failure to require payment of the producer's published charges for packages; payment for returned unserviceable sacks or for sacks of another producer; granting any form of rebate, refund, credit, or unearned discount, or special services to one customer not given to others (Fng. 14 (d), R. 16069–70).[34]

The conclusion that there is no price competition when sales are made, as in the cement industry, under a pricing formula resulting in identity

[34] It should be noted that the Institute's Code of Ethics long antedated the Act of June 19, 1936 (Robinson-Patman Act), which amended Section 2 of the Clayton Act so as to prohibit the granting of services or facilities to one purchaser not equally offered to all others (15 U. S. C. 13 (d), (e)).

in sellers' prices requires no qualification by reason of the freedom of the individual mill to change its base price [25] and to change its status from non-base to base mill or vice versa. While under respondents' pricing formula any such change would bring about a higher or lower delivered price in certain places, the resulting higher or lower price would thereupon be quoted by all alike and there would be continuing identity in the delivered prices of the respondent producers. Furthermore, while frequent and substantial changes in base prices might, even in these circumstances, involve a certain element of price competition, in the cement industry this potential avenue to price competition was not traveled. With minor exceptions, the base prices of the respondent producers in 1938 were those, or substantially those, which they had established in the 1932–33 period (Fng. 23 (e), R. 16127). Base prices "have shown a high degree of rigidity" (*ibid.*).

Absence of price competition among respondent producers is not contradicted, it is rather emphasized, by the variations from their pricing formula found in certain places or areas. Obviously the respondents cannot enforce their formula in places where cement which is not under their control is offered for sale. Imported ce-

[25] In the absence of a contrary finding by the Commission, we assume that there was this freedom of action.

ment frequently produced this situation in seaboard cities, and respondents met this competition by establishing "arbitrary" prices in the territory affected (Fngs. 19 (a), (c), R. 16102, 16104).[26] Such arbitrary or depressed prices have been in effect at various times in South Atlantic port cities and the port prices thus established have been used as bases to which the rail rate was added to determine delivered prices at inland cities reached by foreign cement (R. 7064–6, 7943–4, 11615–6). Like prices have also been quite generally established for North Atlantic port cities, particularly Boston and New York (R. 2493, 2628–9, 7885–7, 7944–5).[27]

[26] In an attempt to control the situation, respondent producers selling in the areas affected have at times boycotted dealers in imported cement and have taken other action to intimidate such dealers (Fngs. 19 (a)–(b), R. 16102–4).

[27] The dual base with different base prices for different areas and the base price which has a limited territorial application, as occasionally found (Fng. 7 (e), R. 15989), introduce minor variations in determining what is the governing base price in the areas affected by such variations, but do not change the principle that the delivered price of the governing base fixes the delivered price of the other respondent producers. There is also no departure from the principle of identity in the delivered price of the various respondent producers when there is a flat or zone price in the metropolitan area of a large city notwithstanding some variation in freight rates to points within the area (R. 9761), or when each of a group of mills located within a particular area uses as its freight factor in determining delivered price a minimum line haul rate rather than the actual switching charge payable by the individual mill (Comm. Ex. 971–4 V–4X).

Leading members of the industry have, on occasion, expressed recognition of its essentially non-competitive character. The chairman of the marketing research committee of the Institute, writing to the president of the Portland Cement Association in July 1934 with reference to advertisements published by the Institute designed to allay public criticism of the industry's practices, stated that he believed that "the economic foundation for some of these discussions of price making is frail" and that "no sound defense of our methods of selling cement can be made without the admission that some limitation of competition is necessary in such an industry as cement" (Fng. 21 (f), R. 16120). The same chairman, in a letter in May 1934 to the chairman of the Code Authority, wrote (*ibid.*):[28]

> Do you think any of the arguments for the basing-point system, which we have thus far advanced, will arouse anything but derision in and out of the government? I have read them all recently. Some of them are very clever and ingenious. They amount to this however: that we price this way in order to discourage monopolistic practices and to preserve free competition, etc. This is sheer bunk and hypocrisy. The truth is of course—and there can be no serious, respectable discussion of our case unless this is acknowl-

[28] As to the right of the Commission to admit this letter in evidence, see *infra*, pp. 88–90.

edged—that ours is an industry above all others that cannot stand free competition, that must systematically restrain competition or be ruined.

In connection with this same advertising campaign the president of Lone Star wrote in March 1934 to the chairman of the Institute's committee on public relations describing certain practices which he thought had contributed to public mistrust of the cement industry (Fng. 21 (c), R. 16113–4). Among those which he described are (*idem.*, R. 16114–5):

(2) *Uniform destination prices.*

The uninitiated are mystified by the industry's ability to anticipate competitor's price at a given time and place. The uniform refusal of manufacturers to bid mill prices has contributed to the misunderstanding.

* * * * *

(8) *Mills without base prices.*

The toleration by the industry of those who poach in high priced areas has not created a feeling of confidence in the desire of management to protect the consumer.

C. *The Evidence Furnishes Overwhelming Support for the Finding that Respondents Combined to Restrain Price Competition among Themselves and to Use a System of Pricing Resulting in Identical Delivered Prices*

Where the question whether the parties respondent have acted in combination is relevant to

a determination of whether they have violated the Federal Trade Commission Act, the rules governing the proof required to support a finding of combination are certainly no stricter than those which govern the sufficiency of the proof where a court or jury finds combination or conspiracy among the defendants in a proceeding under the Sherman Act. Accordingly, the sufficiency of the evidence respecting combination among the present respondents must be judged by the settled rule that a combination or conspiracy under the Sherman Act "may be inferred from the things actually done" and that the essential combination or conspiracy "may be found in a course of dealings or other circumstances, as well as in an exchange of words."[29]

---

[29] *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, 612; *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85, 99; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 222–223; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809–810.

For like decisions by lower federal courts, see the decision of the lower court in the *American Tobacco* case, 147 F. 2d 93, 107 (C. C. A. 6); *United States* v. *Pullman Co.*, 50 F. Supp. 123, 134 (E. D. Pa.); *U. S. Maltsters Ass'n* v. *Federal Trade Commission*, 152 F. 2d 161, 162 (C. C. A. 7).

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, where the leading members of an industry operating in an area embracing 11 States were charged with conspiring to restrain interstate commerce, this Court said (p. 177):

"The alleged conspiracy is not to be found in any formal contract or agreement. It is to be pieced together from the testimony of many witnesses and the contents of over 1,000 exhibits, extending through the 3,900 printed pages of the record."

In a proceeding under the Federal Trade Commission Act the Commission is, by the terms of the statute, the final arbiter as to the facts in so far as its findings are "supported by evidence", and, of course, this statutory requirement equally applies where, as here, the findings of the Commission cover a wide range of activity and rest upon a voluminous record. It is also for the Commission to determine "the inferences reasonably to be drawn" from the facts and circumstances shown by the evidence. *Federal Trade Commission* v. *Pacific States Paper Ass'n*, 273 U. S. 52, 63. In consequence, a reviewing court in passing upon the question whether a finding has evidentiary support is not authorized to "make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73.

We submit that in the present case the proof relating to one aspect of respondents' activities would, even if all other proof of combination were lacking, fully sustain findings of combination as charged in the Commission's complaint. The proof to which we refer deals with the submission of sealed bids at identical price to governmental agencies. While the Commission's findings on this subject are arresting (Fngs. 9 (b)–(d), R. 16023–8), they are illustrative rather than exhaustive. The previously quoted testimony of Admiral

Peoples (*supra*, note 23, p. 44) shows that even after the filing of the present complaint identical prices were bid on at least 95% of thousands of orders for cement placed by the federal government. And the Institute's brief in the court below[30] expressly stated (p. 57) that it raised no issue as to "the substantial identity of prices on a substantial number of the 2210" sealed bids to governmental agencies, state and federal, which the evidence disclosed.

Since the basis on which these bids are made is delivered price, which means that the seller's realization is the delivered price less the cost of transportation to destination, and since the mill having the lowest freight rate to the particular destination will in many cases have the lowest delivered cost, it can profitably underbid others by at least a part of the higher transportation costs which reduce the realization of other bidders. In addition, since all know the delivered price which respondents' pricing formula produces, it would have been a simple matter for any respondent, if it had so desired, to have underbid this price by a small margin and thus to have become the low bidder.

The process of thus easily becoming low bidder could not, it is true, be indefinitely repeated. This simply means, however, that on sales of ce-

[30] The Institute's brief was also filed on behalf of 82 of the other 97 respondents.

ment to public agencies the respondent producers would then compete in price, a situation or condition which, as all of their actions show, they wish to avoid. Had even one substantial producer, or two or three less important ones, departed from respondents' pricing system when submitting bids to public agencies, the system would, at least so far as sales to such agencies are concerned, have collapsed like a house of cards. That it did not is the clearest possible evidence that there was joint understanding, purpose and plan on the part of respondents not to compete with each other in price and, to this end, to make common use of their multiple basing-point delivered-price system in the sale of cement.

An essential condition to maintenance of respondents' pricing system and its concomitant identical delivered prices is strict observance of the pricing system by all. When various groups of respondent producers bid, on repeated occasions, strictly according to respondents' pricing formula, they thereby implicitly assured each other that they would continue their prior observance of the pricing formula. Since continuation of the pricing system was dependent upon reciprocal action by others, each respondent producer, when he bid according to the prescribed formula, was effectuating, and was affirming his participation in, a scheme of pricing which, in effect and in purpose, eliminated all price competition among the parties

respondent. Under these circumstances, no explicit avowal of combination is necessary; their acts constitute combination and agreement. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227.

Under the *Interstate Circuit* ruling it would seem that combination among respondents is implied by their conduct as a matter of law. But whether or not this be so, at least their acts were such that the Commission could reasonably draw therefrom the inference of fact that they were acting pursuant to combination, agreement and implied understanding. As an officer of a trade association of cement manufacturers observed, any one might well be "confounded by the riddle of how he can get a dozen bids listing identical quotations at 102 destinations, except by collusion" (*supra*, note 5, p. 14).

It will scarcely be contended that the price identity in the sealed bids which respondent producers submitted to public agencies was mere happenstance. Wholly apart from the extensive other evidence supporting the conclusion that there was combination and agreement among respondents not to compete in price and to use a pricing system producing identity in delivered

prices,[36a] the evidence as to identical bids which has been set forth is in itself sufficient to support this conclusion. *U. S. Maltsters Ass'n* v. *Federal Trade Commission*, 152 F. 2d 161 (C. C. A. 7); *Milk & Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d 479 (C. C. A. 7); *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. 2d 899 (C. C. A. 7), certiorari denied, 329 U. S. 795.

Each of the three cases just cited, like the present one, involved use of a pricing system by the members of an industry under which their delivered prices were identical at any given place. In the *Maltsters* case the petitioners conceded that their collective activities as members of a trade association "constituted an agreement" and the court declared (p. 164) that any conclusion other than that a price-fixing agreement existed "would do violence to common sense and the realities of the situation." In the *Milk Can* case the court said (p. 481), with reference to the fact that the petitioners used a pricing system which resulted in identical delivered prices: "Just how such an unnatural situation could be brought about by members of an industry without a plan or agreement is difficult, if not impossible, to visualize." It also said (p. 482) that "it taxes our credulity to believe, as argued, that petitioners employed this

[36a] See findings of the Commission discussed *infra*, pp. 69–80, which incorporate extensive documentary and other undisputed evidence.

system without any agreement or plan among themselves." In the *Fort Howard* case, where the United States was divided into zones and sales were at a delivered price uniform for any point within a zone, the court said (p. 906): "We are unable to comprehend a manufacturer's disdain of a natural advantage utilizing the same to gain local business, unless he were indoctrinated with the belief * * * that elimination of all competition was economically preferable." It further said (p. 907) that "the artificiality and arbitrariness of the zone structure is so apparent it cannot withstand the inference of agreement."

The present respondents have sought to eliminate or overcome any condition or circumstance which would obstruct or defeat identity in price in sealed bids to public agencies. In June 1934 the President issued Executive Order No. 6767, providing that where a code of fair competition approved under the National Industrial Recovery Act requires the advance filing of prices with the Code Authority, there is compliance with these requirements when a bid is submitted to a public agency at a price not more than 15% below the bidder's filed price (Comm. Ex. 179). Ninety-two percent of the members of the industry signed a protest against this Order and requested that the cement industry be exempted from its provisions (Comm. Ex. 277 E). At an NRA hearing a statement made on behalf of the in-

dustry declared that the Order "invites a return to primitive and unintelligent methods of competition" (Comm. Ex. 598 I). As of January 19, 1935, no member of the cement industry had, so far as the Code Authority knew, "taken advantage of" the permission granted by the Executive Order (Comm. Ex. 277 D).

When the Government demanded quotation of f. o. b. mill prices, which, if genuinely made, would have disrupted respondents' system of selling at identical prices, there was determined opposition by respondents. The industry did not comply with a request made by the President of the United States in May 1934 that cement producers quote purchasers f. o. b. mill prices. John Treanor, president of a respondent, who had been requested by the chairman of the Code Authority to take up the matter with the Chairman of the Tennessee Valley Authority, wrote the latter that it was certain that the cement industry would not voluntarily sell at f. o. b. mill prices, "for a very substantial part of it, having made its plant investment with reference to the basing point system, now has a vital interest in keeping that system in force." (Fng. 7 (r), R. 16004–6.)

When respondents did submit bids to Government purchasing officers f. o. b. mill, they calculated their f. o. b. mill prices by subtracting from the delivered price arrived at by respondents' pricing formula the freight rate from the

bidder's mill to delivery point, with the result that although these derived f. o. b. mill prices might vary greatly among bidders, they resulted in identical cost to the Government at point of delivery (Fng. 8 (i), R. 16013–4). In substance, what the respondents did, therefore, was to bid at an identical delivered price. In order to accomplish this result when land grant rates were involved, the respondents, through the Institute, sought to secure from every available source information as to these rates and the Institute published and disseminated to respondent producers the information so secured (Fngs. 8 (m)–(n), R. 16018–21). From time to time groups of respondents concerned in the same bid had understandings and agreements as to the rates to be used or the price to be bid (Fngs. 8 (i), (l), R. 16014, 16016–8). In addition, there was developed during the NRA period a "control clause" for insertion in bids to the federal government, which provided that the Government might deduct from the bidder's quoted price the amount by which the land grant rate was less than the commercial freight rate from mill to destination (Fng. 8 (k), R. 16015–6). The effect of this clause was to continue "the parity as between derived prices f. o. b. mill" (*idem.*, R. 16016).

We have discussed in some detail the evidence relating to bids to public agencies at identical prices. There seems no necessity similarly to de-

tail the wealth of other evidence from which the inference might reasonably be drawn that there was combination and agreement among respondents not to compete in price and to sell at identical prices under respondents' multiple basing-point, delivered-price system.

Taking the most general view of the matter, it is open to serious question whether a pricing system such as that employed by respondents, so universal in its application and so customarily followed, could ever be maintained against inevitable corrosive forces without agreement, and constant and vigilant collective action.[21] The necessity of controlling such disruptive forces as are present in times of depression, as are posed by the availability of other and cheaper forms of transportation, or as arise from the force of necessitous circumstances occasionally operating on individual producers, is well illustrated in this case. The evidence and the Commission's findings show that many kinds of collective action were taken by respondents to prevent any competition in price and any deviation from the identical prices produced by the use and application of respondents' pricing formula (see *supra*, pp. 20–21, 56–58; *infra*, pp. 69–80). Such conduct permits, if it does not compel, inference of agreement.

[21] See Mund, *Monopolistic Competition Theory and Public Price Policy* (1942), 32 Amer. Econ. Rev. 727. Cf. Clark, *Imperfect Competition Theory and Basing-Point Problems* (1943), 33 *id.* 283.

The Commission also found that there had been a long history of cooperative action by members of the cement industry through the medium of trade associations;[22] indoctrination of members of the industry with the philosophy of noncompetition (Fng. 7 (b), R. 15984–7); collective action, through advertisements and otherwise, to offset criticism of the industry because of its noncompetitive character (Fng. 21, R. 16108–22); and concentration of control over a majority of the industry's productive capacity in comparatively few companies and individuals (Fng. 4, R. 15981–2).

There is clear warrant for the view of the Commission that the findings of fact set forth above are relevant to the charges of combination presented to the Commission for determination. In *American Tobacco Co.* v. *United States,* 328 U. S. 781, 793, this Court pointed out that, "entirely from circumstantial evidence," the jury in that case had found the existence of a combination or conspiracy in violation of the Sherman Act. The Court also pointed out in this connection that the practices of the defendants which the government attacked had remained largely within the hands of the same general group of business organizations for over a generation and that a friendly relationship arising out of community of interest among the members of such a long

[22] Fngs. 5, 6 (a), 7 (i), R. 15983–4, 15992–6.

established industry "provides a natural foundation for working policies and understandings" favored by them (*ibid.*).

D. *Combination among Respondents not to Compete in Price and to Sell Cement under Respondents' Multiple-basing Point Delivered-price System was Found by the Commission*

The charge before the Commission under count one of the complaint was that the respondents were maintaining a combination to restrain price competition and were, as a part of this combination, using the multiple-basing point delivered-price system under which at any given destination point the price of every respondent producer was identical. The basic findings made by the Commission were that respondent producers have consistently used this pricing system and have employed many different kinds and types of collective action directed at maintenance of this pricing system and the elimination of price competition among themselves.

The court below nevertheless concluded, and respondents contend, that the Commission's order is defective for want of an explicit finding by the Commission that there was implied agreement or combination among respondents to use the multiple-basing point delivered-price system and not to compete with each other in price in the sale of cement. Our answer to this is that both certain

general findings of the Commission respecting combination among respondents and the findings which it made that respondents collectively undertook to prevent competition in price among themselves and to promote and maintain the perfect functioning and general use of the multiple basing-point delivered-price system, constitute adequate findings of such combination.

1. *The Commission's General Findings of Combination constitute Findings of the Combination Charged against Respondents*

The complaint issued against respondents charged that they had combined to restrain price competition among themselves and to sell cement under the multiple-basing point delivered-price system, and that they were thereby violating the Federal Trade Commission Act. The "Conclusion" which the Commission drew from its findings was: "The *aforesaid combination* and acts and practices of respondents pursuant thereto and in connection therewith, *as hereinabove found*," [33] constitute unfair methods of competition within the meaning of the Federal Trade Commission Act (R. 16132). The order entered by the Commission was likewise framed in terms of combination. The Commission directed respondents to cease and desist from continuing or carrying out "any planned common course of action, under-

[33] Italics supplied.

standing, agreement, combination, or conspiracy" between and among any two or more of them, to do certain specified acts (R. 16135). Combination is thus the focal point of complaint, conclusion and order. Respondents would say of the findings, however, that they are "like *Hamlet* without the Prince of Denmark".

It was clearly the intention and understanding of the Commission that its findings should and did set forth that respondents had combined and agreed to suppress price competition among themselves and to use the multiple-basing point delivered-price system. We submit that the meaning of an administrative order, like that of a statute or any other document, is to be gathered from reading it as a unitary whole and by resort to all other relevant aids to construction, including the intent manifested by its authors.

The Commission's findings, so read, leave no doubt as to their meaning. The last paragraph of the findings states that the capacity, tendency and effect of "the combination maintained by the respondents herein in the manner aforesaid" and their acts and practices "thereunder and in connection therewith" are, among other things, "to hinder, lessen, restrain, and suppress competition in the sale and distribution of cement" and "to promote and maintain their multiple basing-point delivered-price system and obstruct and defeat any form of competition which threatens or tends

to threaten the continued use and maintenance of said system and the uniformity of prices created and maintained by its use" (Fng. 26, R. 16131–2). This constitutes a finding of combination among respondents, the nature of which is denoted by reference to the prior findings—which set forth the many means concertedly employed by respondents to eliminate price competition among themselves and to maintain and enforce their non-competitive pricing system—and by reference to the tendency and effect of respondents' combination as declared in the finding.

Paragraph 24 (a) of the findings, which summarizes the allegations of count two of the complaint, states that count two alleges that discrimination in price among the customers of the various respondent producers "is the result of respondents' combination to use the multiple basing-point delivered-price system" (R. 16127). The following paragraph, 24 (b), states that "the Commission finds" that each material allegation of count two, "and in particular each of the above-described allegations, is sustained by the evidence" (R. 16128). This is a specific finding that there was combination among respondents to use the multiple basing-point delivered-price system in the sale of cement.

The Commission found that one of the purposes for which the Institute was organized was to maintain such "lawful trade customs and usages" as

the Institute may deem advisable, and that one of the "customs and usages" to be so maintained was the multiple basing-point delivered-price system (Fng. 7 (o), R. 16000).[34] The Commission also found that the Institute was created to guide and direct the trade practices of its producer members[35] and it found that, aside from the Institute itself, all respondents were, with one exception, members, officers or trustees of the Institute (Fngs. 1 (a)–(d), R. 15962–3). The Commission's finding that a purpose of the Institute was to maintain the multiple basing-point delivered-price system is a finding that there was combination and agreement by and between the Institute and its members and officers to maintain this system; no distinction can be drawn between the purposes of an unincorporated trade association such as the Institute and the purposes of the members of which the association is composed (see *infra*, pp. 95–97).

2. The Findings of Respondents' Concerted Action to Prevent Competition in Price and to Maintain Their Pricing System Constitute Findings of Combination

Since respondents' pricing formula was known to all of them and since common use of this

[34] The Commission made detailed findings as to the Institute's support of this pricing system (*infra*, p. 94).

[35] One of the purposes of the Institute, as stated in its articles of incorporation, was: "To adopt and promulgate a Code of Ethics for the government of the members. (Fng. 7 (o), R. 16000).

formula inevitably results in identical prices, renewed understandings or agreements on the terms of the formula were not necessary in order for respondents to maintain identical prices for an indefinite period of time; continued, mutual use of the formula sufficed (Fng. 7 (h), R. 15991). But no matter how letter-perfect a formula for selling at uniform prices may be, there are likely to be special circumstances or conditions in which the formula fails to achieve complete and absolute uniformity in price.[36] Accordingly, if in the present case the Commission found, as it did find (*infra*, pp. 69–80), that respondents collectively undertook to regulate, control or stamp out such practices as might lead to price competition among them or to impairment of the price uniformity called for by their pricing formula, this constituted a finding by the Commission that respondents combined and agreed to restrain competition in price and to use and maintain their pricing formula.

When members of an industry, with knowledge of the like action of others, take the steps requi-

[36] When the leading sugar refiners adopted a program of maintaining a uniform price structure among purchasers of their product, labeled "non-discrimination" between customers, and agreed not to deviate from their published prices, the refiners found that, in order to make their program effective, it was also necessary, or at least desirable, to exercise control over a wide variety of incidental trade practices. *United States* v. *Sugar Institute, Inc.*, 15 F. Supp. 817 (S. D. N. Y.), affirmed, 297 U. S. 553.

site to render effective a plan or program which, if carried out, will impose restraints of trade of a kind prohibited by the Sherman Act, those so acting are parties to an unlawful combination or agreement in restraint of trade. *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 723; *United States* v. *Masonite Corp.*, 316 U. S. 265, 274–275; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226–227.

In the *Bausch & Lomb* case, the Soft-Lite Lens Company had announced to the trade a plan of distribution under which it furnished to distributors of its product suggested resale prices, maintained lists of approved retailers, and sold to those wholesalers who observed the suggested resale prices and who resold to approved retailers (which the wholesalers aided in selecting). This Court held that when wholesalers cooperated in carrying out this plan of distribution, this fact alone established that they were parties to a combination among themselves and with Soft-Lite, in illegal restraint of interstate commerce. The Court said (p. 723):

> The wholesalers accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees. That is sufficient. [Citing cases.]
>
> * * * Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled

with assistance in effectuating its purpose is immaterial.

A like holding was made in *United States* v. *Sugar Institute, Inc.*, 15 F. Supp. 817 (S. D. N. Y.). The principal sugar refiners, who ordinarily sold their sugar f. o. b. refinery, had a program of maintaining uniformity in price as among all customers in any given locality. In the Great Lakes area during the season of open navigation such uniformity tended to be defeated because certain purchasers would arrange for transportation from the refinery by water at a lower cost than the customary transportation by rail. When one leading refiner announced that it would sell in the Great Lakes area only at delivered prices, the others promptly made similar announcements. The court held that it was unnecessary to decide whether there had been a concert of action in "instituting" this system of selling, since evidence showing that the system was "maintained" through concert of action established that the refiners had combined in illegal restraint of trade (15 F. Supp. 817, 851, 904).[37]

In *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (C. C. A. 7), certiorari denied, 323 U. S. 730, there was evidence to show

[37] On defendants' appeal, they waived their assignment of error to this holding and this Court therefore did not pass upon it. *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 590–591.

that certain of the companies against which the Commission's order was issued had agreed to sell at identical prices, but the evidence as to other companies was merely that they had at a later time conformed their prices "to the last penny" to that of the others. The court affirmed the order as against the later participants in the combination, saying (p. 331):

> We must look to the substance and not to the form of the conspirators' conduct. We do not think that affirmative, positive, express agreement to maintain prices is essential to establish unfair trade practices. If the parties clearly and intentionally maintain the prices, even though without express agreement, they are liable. In such a situation their action may fall within the prohibition of the Federal Trade Commission Act, 15 U. S. C. A. § 41 et seq.

We now summarize the Commission's numerous findings of collective action by respondents having the effect and purpose of maintaining their multiple basing-point delivered-price system and of assuring the uniformity in price and absence of price competition which are the product of the respondent producers' common use of this pricing system.

(a) Freight rate books

In order for respondents' pricing formula to produce identity in the price of all respondent producers selling at a given destination point, it

is necessary that the freight factor used in calculating the delivered price of each seller be the same (Fng. 8 (a), R. 16006). The Institute has published rate books for substantially every state east of the Rocky Mountains showing freight rates on cement from each of a number of points to all destinations in a given state or states (Fng. 8 (c), R. 16008). These rate books "were intended * * * to provide common freight rate factors for pricing purposes" and to enable the respondent producers "to quote identical delivered prices for cement at all destinations; and they were in fact used for that purpose" (Fng. 8 (d), R. 16008).[38] Most of the respondent producers located in territory covered by the Institute's rate books have regularly used these books for pricing purposes (Fng. 8 (g), R. 16012).[39]

[38] The Institute rate books "lack information that a genuine rate service would be expected to supply"; they gave no information concerning minimum car weights or switching charges and no information which would assist in routing shipments (Fng. 8 (e), R. 16012). They do not include rates from all producing points since rates from nonbase mills are not used by respondents for pricing purposes; but they do include rates from ports where no shipments of domestic cement originate but where foreign cement is imported and which have been used as basing points for pricing purposes (Fng. 8 (f), R. 16012). On November 18, 1935, Huron established a base price at Muskegon, Michigan, where it had no plant, and on the same day the Institute issued freight rates from Muskegon which it had never done before (R. 9779; Com. Exs. 3020BB, 42 [illegible]).

[39] The all-rail freight rates are regularly used by respondents in calculating delivered price even though shipment is

The rate books first issued by the Institute contained conversion tables which translated the freight rates in terms of cents per barrel of cement of 380 pounds, the unit used in the sale of cement, with fractions of a cent eliminated, although railroads apply the rate per hundred pounds to the total weight of the shipment, so that the result shown by these tables differs from the actual freight charge (Fng. 8 (e), R. 16011–2).[40]

(b) Sales f. o. b. mill and land grant rates

The collective action of respondents to maintain uniformity in their delivered prices, by preventing the diversity which might arise from sales f. o. b. mill or from sales to the federal government in which land grant rates are a factor in the purchaser's delivered cost, has already been set forth (*supra,* pp. 57–58) and need not be repeated.

---

made by water or by motor truck at a rate different from the all-rail rate at which the price was calculated (Fng. 8 (g), R. 16013).

[40] While this might seem a trifling variation it is to be borne in mind that a difference in price as small as 1¢ per barrel of cement may divert business from one seller to another (Fng. 9 (a), R. 16023).

The Institute, shortly before issuance of the Commission's complaint, omitted the conversion table from the rate books published by its rate bureau at Bethlehem and had previously omitted them from those published by its other rate bureau at Chicago, but the same method of conversion into rates per barrel has been continued (Fng. 8 (e), R. 16012).

(c) Involuntary or punitive bases

If a base mill or a non-base mill sells to particular customers or in a particular place at a price below that established by respondents' pricing formula, the sale contravenes respondents' formula but the departure, if it is only sporadic, is not of major consequence. In the depth of the economic depression in the early 1930's price concessions of this kind were widespread (Fngs. 6 (c), 10 (d), R. 15987, 16032). Some of the larger units in the industry from time to time undertook to bring into line those whom they regarded as making substantial sales at prices below those produced by application of respondents' pricing formula, by establishing a base price at the location of the offending mill (Fngs. 10 (a), (d), R. 16029–30, 16032). This punitive or involuntary base was frequently below the base price of the mill establishing it (Fng. 10 (a), R. 16030).[a]

Such a punitive base was established at a mill operated by the State of South Dakota. In correspondence between representatives of one respondent producer it was stated that "the industry as a whole hesitates to take this matter up

[a] In this situation the mill's realization from sales at the location of the punitive base is below its own base price not only by the lower amount of the punitive base but also by the full amount of the freight rate from its own mill to the punitive base location.

[definite assurance that the State mill would abide by an increase in price] because their experience in the past has been that the Governor of South Dakota broadcasts anything that is told to the officials of the cement plant and makes the statement that the cement trusts are trying to control their mill." (Fng. 10 (b), R. 16030–1.)

Respondent Marquette Cement Manufacturing Co. had a non-base mill at Cape Girardeau, Missouri, which had the benefit of water transportation. At one period this mill frequently departed from respondents' pricing formula in making sales for delivery at places where its net realization was high. A respondent producer established an involuntary base of $1.35 at this mill in November 1930. This represented a price reduction of 10¢ a barrel. The involuntary base price was successively lowered until it reached 75¢ a barrel in June 1932. Shortly thereafter respondent Marquette agreed to take membership in the Portland Cement Association and on the day in which it mailed its membership application it established a base price at its Cape Girardeau mill of $1.15, a price advance of 40¢ which other companies operating in the area met. The mill made further advances in December 1932, January 1933, March 1935, February 1936, and March 1937. The last advance brought its base price to $1.90, a figure sufficiently high to make it inoperative in determining delivered price

under respondents' pricing formula,[42] and the mill thus returned to its former status as a non-base mill. (Fng. 10 (f), R. 16035–7.)

Resentment aroused among respondents by the action of the larger units in the industry in establishing numerous punitive bases in the 1930–1931 period contributed to the withdrawal of many members from the Institute and from the Portland Cement Association, and there was much activity among respondents in seeking a solution of these problems and restoration of price stability (Fng. 10 (e), R. 16032–5).

(d) Truck transportation

Trucking of cement began about 1920 and at first it was the general practice to sell cement f. o. b. trucks at the mill at the delivered price applicable to the buyer's destination less the railway freight charge to that point (Fng. 11 (b), R. 16046). Under this practice the seller lost control over the destination price when transportation by truck was less expensive than by rail (Fng. 11 (a), R. 16045). In the years 1929 and 1930, respondents, through cooperation, understanding, and agreement among themselves and with other interested groups, began taking active steps to discourage and control the trucking of

[42] A base price is inoperative and therefore theoretical if it is higher than the base price of some other mill plus its freight rate to the location of the theoretical base.

cement (Fng. 11 (b), R. 16046). The primary reason for respondents' activity was the destructive effect of trucking upon their delivered price system (*ibid.*). Various plans to this end were used in different localities (Fng. 11 (d), R. 16048).

A conference held in July 1931 which had as its purpose discussion of means to eliminate and control trucking was attended by the president of the Institute, the president of the National Builders Supply Association,[43] and officials of various railroads and railway associations (Fng. 10 (e), R. 16049). Following a meeting of cement manufacturers in November 1931, it was reported that Pittsburgh mills would close their mills to trucks on December 1, 1931, that Ohio producers would soon have a meeting, and that it was expected that they would unanimously follow the Pittsburgh lead (Fng. 10 (f), R. 16052–3). The parties to the July 1931 conference had a further meeting in January 1932, the minutes of which state that in southern Ohio and western Pennsylvania substantially all cement traffic had been returned to the railroads and that initial steps toward like results had been taken as to the Great Lakes

[43] Organized dealers in cement opposed trucking because of fear of losing business through direct sales by producers to users of cement and because of keener competition among dealers if, by means of trucking, one dealer might obtain cement at a lower delivered cost than others (Fng. 10 (e), R. 16049).

district centering principally in Buffalo, Chicago, Cleveland, Detroit and Toledo (*idem.*, R. 16053). Out of 116 mills which reported as to the status of trucking, 85, or over 70%, did not permit trucking under any circumstances and only 13, or 11%, did not either restrict trucking or subject it to some punitive charge (Fng. 11 (h), R. 16064–5).

(e) Diversion in transit

Until recently, the purchaser of cement usually paid the freight charge to the carrier and remitted to the producer the balance of the invoiced delivered price (Fng. 12 (a), (c), R. 16055, 16057). Under respondents' pricing formula, it frequently happened that the delivered price at one destination less the freight rate thereto from the seller's mill would be less than the delivered price at some other destination less the freight rate thereto from the seller's mill (Fng. 12 (a), R. 16055). In that situation a person who purchased cement for delivery at the former point and then directed the railroad to divert the cement to the latter point could obtain it at a lower cost than if he had purchased it for delivery at such point (*ibid.*). "This interfered with respondents' desire to maintain uniform delivered prices at each destination, and they undertook, by means of understandings and agreements, to prevent purchasers making diversions in transit" (*ibid.*).

The Code of Ethics adopted by respondents when the Institute was organized declared it to be an unfair trade practice for a producer to divert, or to permit a purchaser to divert, shipments of cement from one destination to another if this would enable the purchaser to secure the cement at less than the delivered price of the producer at point of final destination. The Institute included a prohibition of such diversion in the Code of Fair Competition for the Cement Industry which it proposed to the National Recovery Administration and the Code, as approved, contained such a prohibition. The "Compendium of Established Terms and Marketing Methods" approved by the trustees of the Institute after the expiration of the NRA Code contained a provision declaring such diversion to be an unfair method of competition and the Compendium recommended use of a standard form of sales contract providing that, if the buyer diverted a shipment of cement, he would pay the delivered price of the seller applicable at the place of final delivery. (Fng. 12 (b), R. 16056.)

A number of respondents, through the transportation committee of the Portland Cement Association and otherwise, endeavored to induce the railroads to accept bills of lading stamped with a prohibition against diversion without the shipper's consent (Fng. 12 (d), R. 16057–8). In

March 1935 the Association of American Railroads recommended acceptance of bills of lading so stamped and thereafter many respondents availed themselves of this privilege (*idem.*, R. 16058)."

(f) Standardization of terms of sale

Pertinent findings of the Commission on this subject have been briefly set forth previously (*supra*, p. 45) and need not be repeated.

(g) Classification of dealer business

A large proportion of the cement sold by respondents is marketed through dealers and price or other irregularity at the dealer level tends to disturb uniformity in the respondent producers' prices and terms of sale (Fng. 17 (a), R. 16089–90). Understandings and agreements among respondents and with dealer organizations to secure uinformity in respondents' dealer policies began many years ago, and the Institute has continued, adapted, and supplemented such concerted action as changing conditions and circumstances have dictated (Fngs. 17 (a)–(b), R. 16090).

The Code of Fair Competition which the Institute presented to the National Recovery Administration provided that, except as otherwise specified, cement shall be marketed in each community

" After the issuance of the present complaint respondent producers generally began prepaying freight on all shipments and, when this is done, the purchaser can obtain no price advantage by means of diversion in transit (Fng. 12 (e), R. 16059).

through the dealers serving such community; specified the classes of purchasers who shall be "sold direct" by the producer; defined the term "dealer"; and prohibited the producer from paying the dealer any commission or other compensation (Fng. 17 (d), R. 16093–4). The NRA Code for the cement industry approved on November 27, 1933, contained substantially the foregoing provisions but by an order of the NRA Administrator on January 24, 1934, these provisions were set aside and were never thereafter a part of the approved NRA Code for the cement industry (*idem.*, R. 16094). Nevertheless, as a result of conferences between respondents and dealers, substantially the same division of business as contained in the stricken NRA Code was announced by various respondents in 1935 (Fng. 17 (e), R. 16096–8). The practices thus established were almost completely uniform, were effective over the areas accounting for the major part of domestic cement consumption, and provided in exact and detailed terms for the types of business which producers will accept and the types which dealers will handle (*idem.*, R. 16098).

Prior to 1935 it had been for many years the established practice for producers to make direct sales to agencies of the Federal Government. The new policy put into effect in 1935 provided that sales of cement to the Federal Government for emergency or unemployment-relief agencies should be made by dealers (Fng. 18 (a), R. 16099). By

reason of such change the Government, on such purchases, was compelled to pay the dealer mark-up and was denied the advantage of land grant rates (*ibid.*). The president of the Institute appointed a committee to maintain contact with Government purchasing agencies and to further, so far as possible, respondents' new dealer policies (Fng. 18 (b), R. 16099).

(h) Boycott of dealers handling imported cement

Imported cement was objectionable to respondents chiefly because of its impact upon domestic prices. For a time late in 1932 or early in 1933 respondent producers engaged in selling cement in the Boston and New York areas boycotted dealers who handled imported cement. In the Boston area representatives of various respondents took turns in watching an importer's place of business and making lists of the dealers whose trucks hauled foreign cement. Some dealers canvassed all respondents who formerly sold cement in the affected areas without being able to purchase. In conversations with dealers, representatives of some of the respondents made reference to the Institute and to meetings of respondents for acting upon the question of removing individual dealers from the "blacklist." In some other localities persuasion and agreement with dealers were used to combat the importation of cement. (Fngs. 19 (a)–(b), R. 16102–4.)

E. *The Court Below Erred in Holding that the Commission had Relied upon Incompetent or Inadmissible Evidence*

The court below held that all evidence as to respondents' activities relating to the formulation or the provisions of the code of fair competition for the cement industry, approved under the provisions of the National Industrial Recovery Act, was incompetent to show combination or conspiracy among respondents before, during, or after the effective period of that Act (R. 16776–9). The court below also held inadmissible the "Treanor letter" of May 17, 1934, written by a deceased Institute official to another Institute official (R. 16779–81).

1. *Respondents' Activities during the Effective Period of the National Industrial Recovery Act*

The most strenuously contested issue before the Commission was whether the absence of price competition among respondent producers was the result of combination and concert of action or whether, as respondents contended, it had evolved naturally out of forces and circumstances inherent in the cement industry. This issue invited and required a searching inquiry into the growth and development of the industry and into the past practices of the respondents and of the Institute to which they were all linked. This inquiry would have been obviously incomplete and de-

ficient if the Commission had failed to give consideration to, and had rejected evidence concerning, the acts of the respondents during the period in which the National Industrial Recovery Act, 48 Stat. 195, was effective—from June 16, 1933, the date of the statute's enactment, to May 27, 1935, when the provisions for approval of codes of fair competition were declared unconstitutional.[45] In addition, since the complaint in this case issued in July 1937 (R. 287) and charged combination among respondents for the past eight years (R. 48), their acts during the 1933–1935 N. I. R. A. period were squarely within the issues presented by the complaint.

Evidence as to respondents' activities in this period was, therefore, obviously relevant and if such evidence be incompetent or inadmissible it can only be by virtue of Section 5 of the National Industrial Recovery Act (48 Stat. 198), which provided that during the time that the Act was in effect and for 60 days thereafter, any code approved under it, and any action complying with its provisions taken during such period, should be exempt from the provisions of the Federal antitrust laws. We assert without qualification that the Commission did not transgress either the spirit or the letter of this exemption.

---

[45] *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, was decided May 27, 1935. The offending provisions of the Act were repealed by joint resolution of Congress effective June 14, 1935, 49 Stat. 375.

The charge against the respondents was that they have maintained a combination not to compete in price and to use the multiple basing-point delivered-price system. No finding of the Commission declares, or even hints, that the NRA Code for the cement industry constituted, or was a part of, such combination. In so far as the findings refer to this code, it is only in connection with tracing the history of certain acts and practices of the respondents. The findings set forth these acts and practices, not as being in themselves a violation of the antitrust laws, but as evidencing the existence of the over-all combination among respondents charged in the complaint (see *supra*, pp. 69–80). Moreover, in each instance in which the findings quote or state the substance of a provision of the NRA Code, the findings also state that the same acts or practices had been collectively undertaken, approved or enforced both before promulgation of the NRA Code and after its demise.[46]

---

[46] See Findings 11 (g), R. 16054; 12 (b), R. 16056; 13 (f), R. 16062–3; 14 (f)–(g), R. 16070–1; 17 (d), R. 16093–4; 20 (a), R. 16104–5.

With the exception of the finding (17 (d)) relating to classification of dealer business which has been previously discussed (*supra*, pp. 78–79), each of the foregoing findings states that the NRA Code provision was embodied in substantially identical form in the "Compendium of Established Terms and Marketing Methods." This "Compendium" was adopted by the board of trustees of the Institute on December 9, 1935, more than six months after the NRA Code had expired (Fng. 7 (q), R. 16003).

Evidence of what occurred during the effective period of the National Industrial Recovery Act serves to illuminate the conduct of respondents before and after that period. In substance, the Commission found that what the Institute and other respondents had striven to effect prior to this Act they endeavored, usually with success, to incorporate into the NRA Code for the cement industry and sought to continue after the expiration of this code.[47] And, as we have stated, the activities as to which such findings were made involved suppression of practices which tended to break down respondents' system of pricing or to break down the regime of non-competition in price resulting from common use of this pricing system.

We submit that *Standard Oil Co.* v. *United States,* 221 U. S. 1, is a controlling authority establishing the admissibility of evidence relating to the N. I. R. A. period. That case held that it was proper to give consideration to defendants' acts prior to the passage of the Sherman Act in so far as such evidence "tended to throw light upon the acts done after the passage of the Anti-

[47] The Commission also made the specific finding that for some seven months after the *Schechter* decision "the Institute, through its trade practice committee, composed of the same individuals who had previously constituted the Code Authority, attempted to administer some of the provisions of the NRA Code for the Cement Industry" (Fng. 7. (q), R. 16003).

trust Act" (pp. 46–47). Accord, *United States* v. *Reading Co.*, 253 U. S. 26, 43–44. *A fortiori,* evidence respecting the activities of the present respondents during a period in which the Sherman Act was partially suspended, and findings predicated upon that evidence, are proper for the light they may shed upon respondents' prior and subsequent activities.

In *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321, 324 (C. C. A. 7), certiorari denied, 323 U. S. 730, the court pointed out that the Commission had found that in June 1932 the petitioners agreed upon a price list prepared by one of them; that they complied with the prices of the NRA Code from November 1933 to May 27, 1935; that in June 1935, after the *Schechter* decision, they agreed to keep these prices in effect; and that in October 1935 and again in June 1936 they agreed that it was unfair to sell for less than the lowest published price of any member of their trade association. The court, in affirming the order which the Commission had entered based upon its finding of a price-fixing agreement among the petitioners, impliedly approved (pp. 328–329) the admission and consideration of evidence relating to the NRA Code.

In the instant case the court below rested its holding as to the incompetency of such evidence primarily upon *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (R. 16778–9). We submit

that this was a plain misapplication of that decision. This Court there held (p. 228):

> The offers of proof covering the background and operation of the National Industrial Recovery Act and the Petroleum Code, the condition of the oil industry, the alleged encouragement, cooperation and acquiescence of the Federal Petroleum Administration in the buying programs and the like were properly excluded, insofar as they bore on the nature of the restraint and the purpose or end sought to be attained. For as we have seen the reasonableness of the restraint was not properly an issue in the case.

In other words, the ground for sustaining rejection of the evidence in question was not its incompetency but its irrelevance—an agreement to fix prices not being open to the defense that the restraint is reasonable, evidence to show reasonableness is irrelevant and may properly be rejected.

2. *The Treanor Letter*

The Commission quoted in its findings [48] from the Treanor letter mentioned earlier (*supra*, p. 81). The letter was occasioned by the reply sent by the Chairman of the Code Authority to a telegram to him from the Deputy Administrator of NRA stating that he had been requested by the President of the United States to encourage

[48] Findings 7 (r), 21 (f), R. 16005; R. 16120.

manufacturers of cement to submit f. o. b. mill prices to prospective purchasers (Fng. 7 (r), R. 16004).

Treanor[9] in his letter urged that, as a matter of public relations and "good will in governmental quarters", the industry should "strike a new note of cooperation and reasonableness" (R. 391–2). He stated: "The f. o. b. mill price on Federal business is of no real importance, is entirely practical to grant, can and I think will be forced out of us—therefore good trading would have been to give it without any trading" (R. 392). He continued that, on commercial business, it would be necessary to refuse the President's request, adding, "It will not be an easy refusal to defend upon economic grounds" (*ibid.*). In further elaboration of this he inquired whether any of the arguments which the industry had thus far advanced for the basing-point system "will arouse anything but derision in and out of the government"; stated that the argument that the industry prices in this way "in order to discourage monopolistic practices and to preserve free competition" is "sheer bunk and hypocrisy";

[9] Treanor was a trustee of the Institute (Fng. 16 (f), R. 16087), chairman of the Institute's marketing research committee (Fng. 21 (f), R. 16119–20), and president of a respondent producer (Fng. 7 (r), R. 16005). The letter was addressed to B. H. Rader as "Regional Manager" of the Institute (R. 391). Rader at that time was chairman of the Code Authority for the cement industry (Fng. 7 (r), R. 16004).

and added: "The truth is of course—and there can be no serious, respectable discussion of our case unless this is acknowledged—that ours is an industry above all others that cannot stand free competition, that must systematically restrain competition or be ruined" (*ibid.*).

The court gave as reasons for holding this letter inadmissible (1) that it was "written to an official of the Code Authority during the N. R. A. period concerning a provision of the Code" and (2) that it "was clearly the expression of the opinion of the writer upon a question that was more legal than factual" (R. 16780). As to the court's first reason, we have already considered the general question of evidence relating to the NRA Code, but it should be added that the question of pricing cement f. o. b. mill did not concern any Code provision.[50]

As to the court's second reason for rejecting this letter, we know of no principle of law which requires that documents, relevant and otherwise admissible before an administrative body, are to be rejected because they may be said to express an opinion, albeit the opinion of an expert. Com-

[50] The Institute had, indeed, proposed to NRA a Code provision requiring that all cement be sold on a delivered-price basis (except sales to the Federal Government involving land grant rates) and it made "special efforts" to convince the Consumers Advisory Board of NRA that this system was "not objectionable", but the Code as approved did not contain such a provision (Fng. 7 (p), R. 16001–2).

mon-law rules restricting the admissibility of opinion evidence are based upon the supposed need to protect the jury, a temporarily convened body of laymen, from false reasoning.[51] They have no application where the alleged opinion evidence is proffered before an administrative body trained by experience to appraise such evidence and to give it such weight as it intrinsically merits. That administrative bodies are not to be narrowly constrained by technical rules as to the admissibility of proof has long been recognized by this Court. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44.

Even if the rules of evidence prevailing in judicial proceedings were to be applied, the letter would clearly be admissible both as an admission by a party to the cause offered by the opposing party (Wigmore, *Evidence* (3d ed. 1940) Sec. 1048) [52] and as appropriate background evidence to show the state of mind of a leader in the industry, prominent in Institute affairs (*idem.*, Sec. 1714). The cases to which the court below refers, *Bridges* v. *Wixon*, 326 U. S. 135, and *United States* v. *International Harvester Co.*,

[51] See, generally, Vanderbilt, *The Technique of Proof before Administrative Bodies*, 24 Iowa L. Rev. 464.

[52] Since Treanor was a trustee of the Institute and chairman of one of its committees (*supra*, note 49, p. 87), his admissions are those of the Institute on ordinary agency principles. As observed in the dissent in the court below, the Treanor letter was an "admission of a party to a conspiracy" (R. 16820).

274 U. S. 693, involved the use as evidence of unsworn, *ex parte* statements by third persons and are not in point.

F. *The Evidence and Findings Sufficiently Connect All of the Respondents with the Combination Found to Exist Among Them, and the Commission's Order Should Be Affirmed as to Each Respondent*

Certain respondent producers urged in the court below that, even on the assumption that the Commission correctly found the existence of an over-all combination to restrain competition and to use the multiple basing-point delivered-price system, the findings do not sufficiently link them individually to such combination. The contention apparently is that the Commission must point with great specificity to the manner in which each respondent embraced and furthered the combination which it found to exist. They particularly criticize such findings as refer, without specification, to "some" respondents, "most" respondents, "a number of" respondents.[33]

Of course it is true that all respondents did not participate equally, that is, in the same degree and manner, in the combination which the Commission found or in the activities by which it was maintained. This is given explicit recog-

[33] The court below declared the findings to be "uncertain and indefinite" in this respect (R. 16782).

nition in the findings of the Commission. In reviewing the history of group action in the cement industry, the Commission found (Fng. 6 (a), R. 15984):

> Some of the respondents have been parties to substantially all of these activities; other respondents have participated in a lesser degree, or fully or partially for shorter periods of time; other respondents have been mere followers, adopting and supporting the practices of their more active associates; and a few respondents have from time to time, for various reasons, participated only reluctantly in some of the practices, and have occasionally opposed for a time particular instances of group action.

Certainly where the charge before the Commission is combination among the respondents the statutory requirement that the Commission make "findings as to the facts" does not impose upon it the burden of setting forth in its findings the character and extent of the participation of each respondent in such over-all combination as the Commission finds to exist. Particularly is this so where, as here, the gravamen of the charge is combination to eliminate competition through use, by common agreement, of a pricing system having such effect; all members of the industry who are respondents have used this system; and all such respondents are members of a trade association

which has actively promoted and maintained this pricing system.[54]

We submit that there is no merit to respondents' contention that the findings do not adequately specify the participation of particular respondents in the acts and practices by which the combination was effectuated. We also point out that the findings, notwithstanding the generality of some of them with reference to the particular respondents involved, do in many instances specify and identify. For example, 45 of the 75 respondent producers, or 60% of them, are identified as having submitted identical bids to public agencies (Fngs. 9 (b)-(c), R. 16023–8).

We now turn to a different contention, made by 13 respondents in the court below,[55] that the evidence, even if it warrants a finding of combination among respondents generally, provides no support for a finding of their participation in the combination. We understand the basic contention of these respondents to be—(1) that the evidence does not show participation by them, or at least any substantial participation, in the activities of the Institute or other collective action set forth in the Commission's findings, and (2) that the evidence shows that the pricing practices of these respondents differed to some extent from the

[54] As to the legal significance of such membership under the facts of this case, see *infra*, pp. 95–97.

[55] The single respondent in each of Nos. 25, 27, 28, 29, 30 and 32, and the seven respondents in No. 26.

multiple basing-point pricing system described in the findings.

The court below did not pass upon the question whether the evidence was sufficient to connect each of the respondents with the combination found by the Commission. We submit that the question can be disposed of by the application of certain general principles and that final determination of the pending cases by this Court would not require a detailed review of the evidence applicable to the 13 respondents asserting a special position. We submit that if this Court determines that the Institute was properly found to have been supporting and maintaining the multiple basing-point delivered-price system and elimination of price competition among respondents, then the undisputed fact that the 13 respondents were members of the Institute, plus the fact that their pricing practices did not vary significantly from the pricing system used by the other respondents, are sufficient to suport the Commission's findings and order as to these respondents.

The Commission found that all but one of the respondent producers was a member of the Institute,[56] that its members included practically all

[56] The exception was Valley Forge Cement Co., which marketed all of its cement through Allentown Portland Cement Co., a member of the Institute but not a respondent (Fng. 1 (3t), R. 15977). All officers and directors of Valley Forge are officers and directors of Allentown and the Institute has listed Valley Forge as a member, followed parenthetically by Allentown (*idem*., R. 15977–8).

domestic producers of cement, and that it was an effective vehicle for the formulation and execution of the collective plans and purposes of the members of the cement industry (Fngs. 1 (a), 4 (c), R. 15962, R. 15982). The evidence introduced before the Commission, and its findings made upon the basis of that evidence, largely focussed upon the activities of the Institute.[57]

[57] Purpose of the Institute to maintain multiple basing-point delivered-price system, the Institute's condemnation of diversion because of its tendency to break down this system, and the Institute's sponsorship of a standard contract providing for sale at a delivered price (Fngs. 7 (o)-(q), R. 16000-4; Fngs. 12 (b)-(c), R. 16056-7).

The Institute's maintenance of rate books in support of respondents' pricing system (Fngs. 7 (c)-(d), (e)-(f), R. 16007-8, R. 16011-2).

The Institute's collection and dissemination of land grant rates to prevent price variation among respondents in sales to the Federal Government (Fng. 7 (n), R. 16019-21).

The Institute's sponsorship of exchange of information as to specific job contracts and of collective action to secure enforcement of such contracts (Fngs. 13 (a)-(b), (d)-(g), R. 16060, R. 16061-5).

The Institute's sponsorship of uniform terms and conditions of sales (Fngs. 14 (a), (d), (g), R. 16065, R. 16069-70, R. 16071).

The Institute's collection and dissemination of statistics designed to limit or allocate production (Fngs. 15 (c)-(g), R. 16073-7).

The Institute's opposition to new productive facilities (Fngs 16 (b)-(c); (e)-(f), R. 16082-3, R. 16087-9).

The Institute's sponsorship of classification of dealer business (Fngs. 17 (b), (d), (e)-(f), R. 16090, R. 16093-4, R. 16097-9; Fng. 18 (b), R. 16099-16101).

The Institute's propaganda campaign to defend respondents' pricing system (Fngs. 21 (a), (c)-(f), R. 16108, R. 16111-20).

In order to charge the various members of a trade association with complicity in a combination between it and its members to maintain a non-competitive condition, price-wise, in the industry, it is not necessary to show that each member participated in each activity of the association directed toward maintenance of this non-competitive condition.[58] In many instances the nature of the action might be such that only the association would be the actor. It is the fact of membership, with knowledge, express or necessarily implied, of the purposes and acts of the association, not the degree of participation in its affairs, which renders the member responsible as a participant in the joint undertaking of the association and his fellow members.

Members of a trade association, such as the Institute here, are charged with acts of the association of which they knew or should have known, and cannot escape liability because they were less aggressive than others in the conduct of its affairs or because they at times opposed particular policies. Short of some substantial act of dissociation, complaisant members of the group remain equally liable with the leaders. *Phelps Dodge Refining Corp.* v. *Federal Trade Commis-*

[58] In *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 118–119 (C. C. A. 6), affirmed on other grounds, 328 U. S. 781, the court held that individual defendants in a criminal conspiracy case under the Sherman Act were not relieved from liability by reason of the fact that they all did not take take part in the same acts.

sion, 139 F. 2d 393 (C. C. A. 2). In that case the court, in affirming an order directed against a combination to restrain competition, said (p. 396):

> Thus the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing.

Since the Institute, under the findings of the Commission, had as a primary goal maintenance of the multiple basing-point delivered-price system of pricing (*supra,* pp. 20, 94), the act of joining the Institute, coupled with subsequent adherence to the pricing system, is tantamount to explicit agreement to maintain the system. On substantially less evidence of agreement, a finding of combination made by the Federal Trade Commission has been sustained. *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321, 331 (C. C. A. 7), certiorari denied, 323 U. S. 730. The court there said (p. 331):

> Where numerous competitors fixed the prices which they agree to maintain, and

another competitor, not a party to the agreement originally, adopts the schedule and makes his prices agree, to the last penny, as the petitioners did, with the prices which the competitors fixed and charged, he can not avoid responsibility for his action even though he be less active in the first instance, or because his subsequent action was without affirmative, express agreement on his part to maintain the prices fixed by the others.

The rule under which members of a trade association are held responsible for the acts of their association of which they knew or should have known is but a facet of the general principles governing the law of conspiracy. As this Court has noted, "it is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators." *Interstate Circuit* v. *United States,* 306 U. S. 208, 227. It is immaterial whether a combination is "achieved by agreement or by acquiescence * * * coupled with assistance in effectuating its purpose." *United States* v. *Bausch & Lomb,* 321 U. S. 707, 723. "Informed and interested cooperation, stimulation, instigation" may justify taking "the step from knowledge to intent and agreement." *Direct Sales Co.* v. *United States,* 319 U. S. 703, 713.

It may be, though it is unnecessary to determine, that either membership in the Institute or

adherence to its pricing scheme, standing alone, would sufficiently evidence the joinder of a cement producer in the agreement. Certainly the two factors combined are sufficient.

Of the two factors, Institute membership and adherence to the pricing formula, all respondents undeniably fulfill the first requirement.[59] Consideration should, however, be given to the arguments of those who contend that they do not adhere to the Institute-sponsored multiple basing-point pricing scheme and to the substantial evidence which supports, as to them, the Commission's finding that the respondent producers sell their cement under the multiple basing-point delivered-price system (Fng. 7 (a), R. 15988).[60]

The Commission found that in southern California "the basing-point system of pricing is modified by an elaborate system of zone prices applicable in certain areas" (Fng. 7 (m), R. 16000). Despite this finding, respondents Riverside Cement Co. (No. 30) and California Portland Cement Co. (No. 32), both of them producers in this area, have urged that they do not adhere to the

[59] Respondent Valley Forge Cement Co. has made no point of non-Institute membership.

[60] Compare the statement of Mr. Affleck, the president of respondent Universal Atlas Cement Co. and chairman of the Institute's committee on public relations, writing in 1934 with respect to the basing point system, that "there is practically unanimous agreement that this system should be maintained as the only workable one" (Com. Ex. 662-A).

basing-point system. As substantial evidence supporting the Commission's finding with respect to Riverside, we point to repeated documentary statements by Riverside officials that it used a delivered-price basing-point system.[61] With respect to respondent California, there was likewise evidence that it used a basing-point system of pricing in sales in Arizona.[62]

Although California and Riverside have contended that they freely quote f. o. b. mill, California wrote that it was through maintenance of a policy of no sales f. o. b. mill that respondents are able to assure themselves that all mills will quote the same delivered prices (Comm. Ex. 971–22Z). California's and Riverside's price lists are made on a destination-price basis and their destination prices are the same.[63] California in its brief below admitted (pp. 32–33) that "Up to the last few years the f. o. b. mill price was usually a derived price, derived from the regular destination list price and a deduction of commercial freight".

Both California and Riverside were members of the Pacific Coast Cement Institute (R. 3474).

[61] Comm. Exs. 967–8Y, 967–9J, 967–9M. Correspondence involving the Clark-Burns questionnaire interpreted Riverside's pricing practice as the use in Southern California of a basing-point system, modified by certain blanket zones (Comm. Exs. 971–23U, 971–23V, 971–24F, 971–24G, 971–25M, 971–25N).

[62] R. 13041; Comm. Ex. 967–10H.

[63] Comm. Exs. 1232, 1295, 1305–1308, 1310–1312.

That organization had close ties with respondent Institute[84] and one of its principal activities was the collection and dissemination of land grant rate information.[85] By clearing rates through the Pacific Coast Cement Institute rather than obtaining them individually, respondent producers on the West Coast were able to use common freight rate factors when quoting prices involving land grant rates (see Comm. Exs. 564–2J–2K, 564–2R). In August 1936, just before formation of the Pacific Coast Cement Institute, California and Riverside were exchanging information as to land grant rate factors for use in bidding on cement for Bartlett Dam (Comm. Exs. 562–7K, 7L).

Respondent Huron Portland Cement Co. (No. 27) based its contention below that it did not employ the delivered price system, on the fact that it sold large quantities of cement on the basis of truck delivery. However, the testimony of Huron's officials indicated that sales of cement, actually delivered to customers' trucks at one of Huron's plants, were frequently made at prices equivalent to the delivered price quotations applicable at the place to which the customer intended

[84] When organized in 1936 it was composed of members of the Institute and intended to become a division of the Institute, and for a considerable time its president (who was also president of California) was a trustee of the Institute (Fng. 8 (o), R. 16022; Comm. Ex. 564–3Y–3Z).

[85] Finding 8 (o), R. 16022.

to transport the cement (R. 9879–80; see also R. 9903, 9954). There is also substantial evidence of the part played by Huron in agreements to restrict the territory in which trucking would be allowed and in other action designed to support the basing-point system of respondents.[66]

The Government concedes that at certain periods respondent Marquette Cement Manufacturing Co. (No. 25) has shown some degree of independence and that on occasions it has sold at prices below those produced by respondents' pricing formula. But these represent occasional divergences from Marquette's basic adherence to the established pricing pattern. In the court below Marquette admitted (Br. 40) that it "has had no price at its plant, except insofar as it has quoted f. o. b. plant prices to the United States Government." In the winter of 1932–1933 and the spring of 1933 Marquette submitted delivered price bids identical with those of its competitors on large state road construction projects.[67]

Tabulations furnished by Marquette's officials to explain these identical bids show that the delivered prices were computed by using basing-point prices at points other than Marquette's mills plus freight rate from such points (Comm.

[66] See Fngs. 10 (i), 11 (e), R. 16041, R. 16051. See also R. 3926–31, 3956; Comm. Exs. 417–CC, 2202.

[67] Comm. Exs. 2152A–B, 2154A–B, 2155A–B, 2158A–D, 2161A–E, 2166A–B, 2167A–D, 2604A–F, 2605A–E, 2619, 2812A–B, 2813A–B, 2814.

Ex. 2604–A–F). Marquette was a party to the "destination cost-control clause" method of submitting bids to the Tennessee Valley Authority (Comm. Ex. 400A–F). It, like Huron, was a party to an agreement limiting and regulating trucking in the area around Milwaukee, Manitowoc and Green Bay, Wisconsin (R. 4411; Comm. Ex. 2202), and in the court below Marquette admitted (Br. 38, 44) that it "has always been opposed to" delivery of cement by truck from its mills and that it has "always refused to allow diversions of shipments."

The seven respondents in No. 26 operate the so-called central California cement mills. The Commission found that these mills used the Davenport mill of respondent Santa Cruz Portland Cement Co. as a basing point until about the middle of 1929 when all of these mills became basing points (Fng. 7 (m), R. 16000). This finding is supported by ample evidence.[68] The fact that there were no non-base mills in the area constitutes no departure from respondents' multiple basing-point delivered-price system since under it base and non-base mills use the same pricing formula.

Respondent Superior Portland Cement Co. (No. 28) and respondent Northwestern Portland Ce-

[68] Comm. Exs. 967–7K, –7M, –7W, –8B, –8M, –8Q; 968–11A, –11M; R. 3284, 3291, 3294, 3299–330. The various mills make sales into each other's mill towns (R. 3310–2).

ment Co. (No. 29) operate mills in the western part of the State of Washington. The Commission found that the multiple basing-point delivered-price system was extended to western Washington in 1931; that its introduction there followed a price war which started when two new mills began operating in that territory; and that its introduction approximately coincided with the leasing of one of the new mills by respondent Superior (Fng. 7 (n), R. 16000). This finding, we submit, has ample evidentiary support.[69]

In August 1935 when bids were invited on 720,000 barrels of cement for Grand Coulee Dam, six of the seven bids received purportedly were on an f. o. b. mill basis, but when freight was added the destination cost of four bidders (including respondents Superior and Northwestern) was exactly $1.9188 per barrel (R. 468–472; Comm. Ex. 112D). There is evidence that the four western Washington mills met for the purpose of promoting the adoption of common rates by different railroads (R. 3251–3).

E. P. Lucas, president of Superior, was a trustee of the Institute and director of its District 12; as such director-trustee he represented the cement producers of Oregon and Washington in Institute activities.[70]

[69] R. 3169–79, 3182, 3184, 3201, 3204, 3228–30, 3246; Comm. Exs. 111F, 112D, 159–4, –5, –14, –15, –52, –60, 593D–E, 608–628, 1213A–B, 2366A–B, 2777A–C.

[70] Comm. Exs. 593D–E, 608–628.

II

THE COMMISSION'S DETERMINATION THAT THE RESPONDENTS HAVE VIOLATED SECTION 2 (a) OF THE CLAYTON ACT IS VALID

A. *Each Respondent Discriminated in Price within the Meaning of Section 2 (a) when it Sold Cement at Delivered Prices Yielding a Greater Net Return in Some Localities than in Others*

The Commission found from the evidence of record that the material allegations of count two of the complaint had been sustained, and that the varying mill nets realized by respondents in sales of cement in different localities, produced by their adherence to the basing-point system, resulted in discrimination in price unlawful under subsection (a) of Section 2 of the Clayton Act, as it was amended by the Robinson-Patman Act (Fngs. 24 (b), 25, R. 16128, 16130–1). The Commission found that sales were made "at almost as many true prices as there are customers' locations" (Fng. 24 (a), R. 16127); that the differences in prices realized by respondents in their sales of cement, dependent on the location of their customers, ranged to amounts substantially in excess of $1 per barrel, and commonly amounted to 25¢ to 50¢ per barrel; and that it would be impossible for respondents to realize such varying nets in the form of f. o. b. mill prices (Fng. 24 (b), R. 16128).

That discriminatory prices result from respondents' sales of cement under their pricing formula

may readily be demonstrated. For purposes of determining whether a seller discriminates in price in sales to his purchasers, the sum of money which actually accrues to the seller for his product is alone of consequence. The fact that a seller is willing to quote only delivered prices for his product should not obscure this truism. The so-called "delivered price" of the product represents both the price of the product and the cost of transporting it to the place of delivery; the transportation cost factor, with which the seller has only an indirect concern, must necessarily be stripped from "delivered price" in order to arive at the price the seller exacts for his product.

The Commission found that the accounting practices of respondents recognized their actual realization in sales, or mill net, as the true price of cement. Mill net was the only part of the "delivered price" which respondent sellers ordinarily received from buyers, and which passed through respondents' books as income. Profit or loss on over-all operations, or particular sales, was determined by comparing cost per barrel with mill net per barrel. Economic experts testified that under the course of business pursued by respondents mill net is the true price of cement. (Fng. 24 (c), R. 16129.)

That this is true is particularly apparent from a consideration of the manner in which, as the Commission found, cement was customarily sold

and billed by respondents to purchasers. Until some time after issuance of the complaint in this proceeding, purchasers were sent invoices showing the delivered price of the cement. The freight charges thereon were paid directly to the common carrier and the purchaser remitted to the seller the remainder, or the invoice total less freight paid (Fng. 24 (e), R. 16128–9). Respondents' practice of prepaying freight developed about two years after the issuance of the complaint and then to overcome the practice of diversion in transit by purchasers (Fng. 12 (e), R. 16059).

While the Commission thus found that mill net is the true price of cement, it is necessary to point out, as the Commission did, that its conclusion that illegal price discriminations exist does not depend on this finding (Fng. 24 (e), R. 16130). Even though respondents' theory is adopted that delivered price is true price, many discriminations in price remain. Whenever the delivered price of cement is computed upon a fictitious freight factor, discriminatory prices result. The varying delivered prices exacted by non-base mills in different localities are discriminatory prices which cannot be justified by differences in the cost of delivery. The varying delivered prices of base mills may also be discriminatory where the price to one locality is computed on a rail freight-rate basis but actual delivery is effected by a different form of trans-

portation, as by water or truck, having different rates (Fng. 23 (b), R. 16126).

Giving attention now to non-base mills, it is plain that the true prices realized by them vary with every given locality in which they sell (except as the accidents of the system may result in equivalent prices between some localities). Non-base mills, lacking any true price set by themselves, merely reflect the prices set by base mills within their sales areas. The non-base mill realizes a maximum return from sales made at its home location, and progressively less at localities more distant freightwise. The non-base mill thus denies to "purchasers, who have the natural advantage of proximity to its plant, the price advantages which they are entitled to expect over purchasers at a distance." *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, 757.[71]

The workings of the system magnify the discriminatory prices which the non-base mill exacts. Assume such a mill located at point A whose prices reflect the $2.00 per barrel base price established by another producer at point K, the freight rate between points A and K being $1.00 represented by ten-cent gradations to intervening points B, C, D, and so on to K. The non-base mill now realizes $3.00 in sales of cement at its home loca-

[71] Recognition of the advantages inherent in a purchaser's proximity to the plant would seem particularly necessary in respect of a product so bulky and heavy; and therefore costly to move, as cement.

tion, but its realized price for sales at intervening points is, not this sum less the applicable freight rate, but this sum less *double* the applicable freight rate. For at point C, distance 20¢ freightwise from the non-base mill, the delivered price of cement, derived from the base mill's price, will be $2.80, but of this sum the purchaser will pay 20¢ freight to the carrier and remit but $2.60 to the non-base mill. Each 10¢ addition to the freight rate reduces the non-base mill's true price by 20¢ until at point K it receives but $1.00.[12]

A base mill also frequently exacts and receives discriminatory prices even on sales made within the area in which its base price governs. In all instances where the cement sold by a base mill moves by a means other, and at a rate cheaper, than a railroad common carrier, the prices realized by the base mill exceed the prices on the usual rail-delivered sales within its area. A flagrant example of such price discrimination is provided by the practice of Huron in delivering ce-

[12] In the court below respondents contended that non-base mills develop and exist in areas of small demand and that their high realized prices at their home locations help to offset their disadvantageous locations in respect of substantial consuming areas. While this purported economic justification of the pricing practices of non-base mills lacks pertinence to the legal issues, we point out that the existence of non-base mills at such populous points as Knoxville and Nashville, Tennessee, Osborne (on outskirts of Dayton), Ohio, and Des Moines, Iowa, shows that non-base mills are not confined to areas of small demand (see Appendix A, vol. I, to Institute's brief in court below, p. 367).

ment to purchasers' trucks at its mill door but exacting its base price plus rail freight to the locality to which the purchasers intend to truck (*supra*, pp. 100–101).

With the general situations just recited, the *Corn Products* and *Staley* cases [73] specifically and respectively dealt. In the *Staley* case, the non-base mill located at Decatur, Illinois, whose prices were derived from a Chicago rival's base price, was held to be violating the Clayton Act in its price exactions. This Court said flatly (pp. 750–751):

> * * * price discriminations are necessarily involved where the price basing point is distant from the point of production. This is because * * * the delivered prices upon shipments from Decatur usually include an item of unearned or phantom freight or require the absorption of freight with the consequent variations in the seller's net factory prices. Since such freight differentials bear no relation to the actual cost of delivery, they are systematic discriminations prohibited by § 2 (a), whenever they have the defined effect upon competition.

The Court rejected the contention, identical to that the respondents here have made, that the non-base mill had merely adopted the practice of selling at the same delivered prices as their competi-

[73] 324 U. S. 726; 324 U. S. 746.

tors, whatever they might be, and were, therefore, within the terms of the clause in Section 2 (b) permitting sales at lower prices in good faith to meet competitors' prices. The slavish adherence to a pricing formula which involved systematic price discriminations, at least when no effort was ever made to adopt a nondiscriminatory system, was considered to preclude any claim that it was adopted in "good faith."

Corn Products Refining Co. v. *Federal Trade Commission*, 324 U. S. 726, establishes the illegality of the discriminatory prices received by base mills where prices are at times calculated and exacted on the basis of freight rates greater or less than those actually incurred. There, Corn Products, operating plants at both Chicago and Kansas City, priced and sold its products at delivered prices computed on a Chicago base price plus freight, with the result that for its product delivered from its Kansas City plant, a price was charged which included as an element the freight rate from Chicago. This Court determined that such a pricing formula resulted in the systematic collection of unearned or phantom freight, or absorption of freight,[14] and in the consequent illegal variation of mill nets realized in sales from Kansas City. The situation presented was precisely identical to that here under discussion. In

[14] There was absorption when the Kansas City plant sold in a place having a higher freight rate from Kansas City than from Chicago.

both cases the varying mill net is realized by at times computing and charging a price based on a freight rate greater or less than that actually incurred.

The illegal price discriminations which result from the practices of respondents we have set forth above are hardly open to doubt. The court below apparently considered that there was no justification for the collection of phantom freight and that the Commission had authority to proceed against such practices (R. 16797, 16814),[76] but it held that the Commission was not authorized to strike "indiscriminately" at all respondents because of the illegal methods and practices of some (R. 16815). That phase of discriminatory pricing by respondents involving so-called freight absorption the court held to be not unlawful on grounds we next consider.

---

[76] All non-base mills collect phantom freight. The Commission made no express findings as to the number of base mills which at times collect phantom freight, but the evidence indicates that in certain areas shipments by water are substantial although prices are based on the higher rail rates (Comm. Ex. 971–10X; R. 11179, 11193).

We do not consider that the precise number of non-base mills or their proportion of total productive capacity is a question of vital importance. The Commission found that approximately half of respondents' mills were non-base mills (Fng. 7 (b), R. 15988). Contrary figures submitted by respondents with reference to the situation existing in November 1940, more than three years after the complaint issued, are computed upon a basis open to serious question (*supra*, note 7, p. 17).

B. *When Respondents' Various Base Mills Systematically Sold at Higher Net Prices in Many Localities Than in Others, the Systematically Lower Net Prices in Such Other Localities Were Not Made "in Good Faith" To Meet the Equally Low Price of a "Competitor," Within the Meaning of the Proviso to Section 2 (b) of the Clayton Act*

The base mill exacts and receives the same net price for its product so long as it sells within the territory in which its base price governs and delivery is actually effected by rail. As soon as the base mill sells beyond the area in which its prices are governing, its prices to purchasers outside this area are necessarily lower than its prices to those within."[76] The higher prices are not attributable to higher costs of delivery[77] and constitute discriminatory prices with reference to prices on sales made at any point beyond the area which the base mill governs. Sales beyond this area are also at prices discriminatory with each other (except as the accidents of the system may result in equivalent prices in certain localities).

[76] The purchaser from base mill X at point A, at the edge of the area in which mill X's base price governs, may pay $2.50 for cement of which freight accounts for 50¢, and $2.00 is mill X's realized price; the purchaser at point B, beyond this area and in territory governed by a second base mill, may also pay but $2.50 for cement delivered from mill X, but of this amount he pays 75¢ to the carrier as the freight charge and mill X receives only $1.75 for its product.

[77] See the first proviso to Section 2 (a) of the Clayton Act (*supra*, pp. 4–5).

It is this type of discriminatory pricing which respondents most insistently defend as lawful under the proviso to Section 2 (b) of the Clayton Act, which permits a seller to rebut a prima facie case of discriminatory pricing "by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor." In terms of the example given in note 76, *supra*, the claim is that the lower price realized by mill X in selling at point B results from its meeting in good faith at that point an equally low price of a competitor. With this contention the court below agreed.

Whether respondents' discriminatory prices result from good-faith efforts to meet competitors' prices is a factual question entrusted to the Commission. This was clearly stated by this Court in the *Staley* case (p. 758):

> Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission.[78]

[78] At pp. 752–753 this Court reviewed the legislative history of subsection 2 (b), which confirmed its view that a defense under the proviso clause was "a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination." Among other things the Court cited the report of the Conference Committee referring to the proviso as "intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission."

One difficulty with respondents' reliance on Section 2 (b) is that the Commission has considered the factual question which it poses and has resolved it against respondents. The Commission specifically found that respondents' discriminatory prices were "not made in good faith to meet an equally low price of a competitor" (Fng. 25, R. 16131). To the contrary, respondents' discriminatory prices resulted from agreement among them, effectuated through the vehicle of the Institute, to eliminate all price competition among them. We take it to be self-evident that discriminatory prices which result from an agreement to stifle price competition may not be said to be made in good faith within the meaning of Section 2 (b).[79] That the Commission found such agreement and that there is support therefor in the evidence, have been developed in part I of this brief.

While we contend that the finding of combination among respondents to use the multiple-basing-point system as a device to eliminate price competition precludes justification under Section 2 (b) of the resulting discriminatory prices, we do not suggest that the converse is true. Even in the absence of such combination, the section does not validate respondents' discriminatory prices. The reasons for this conclusion are to be found in

[79] It is also questionable whether, under these circumstances, the lower price which is met is that of a "competitor" within the meaning of Section 2 (b).

the views expressed by this Court in the *Staley* case.

The opinion in that case repeatedly referred to the systematic nature of Staley's price discrimination and to the fact that it "slavishly followed" a pricing policy resulting in systematic discriminations (p. 755). It rejected the argument that Staley's pricing policy was valid because followed by other producers. (p. 753). It stressed the fact that Staley had made no effort to develop any other pricing policy, and implicit in the reasoning is condemnation of a pricing policy which systematically produces higher prices for customers more favorably situated than for those at a distance from the point of production freightwise (p. 754). It said (p. 753):

> But § 2 (b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor."

All of the underlying, influential factors of decision to which reference has been made are present in respondents' pricing system. Under it, the various respondents have, at virtually all times and places, systematically discriminated in prices in order to match the prices of "competitors," with the result that no competition in price exists. This systematic, purposive, and practi-

cally universal equivalence of prices is evidence which amply supports the Commission's factual finding that the lower of the discriminatory prices of any respondent are not made "in good faith" to meet the equally low price of a competitor.

Respondents have made the broad contention, based upon the legislative history of the Robinson-Patman Act, that the effect of the Act is to validate the multiple basing-point system of pricing. This legislative history was carefully considered in the *Corn Products* case and the conclusion was there reached that, while Congress showed unwillingness to outlaw all pricing which was other than f. o. b. mill or factory, Congress also did not intend to exempt from the prohibitions of Section 2 of the Clayton Act delivered prices computed on a basing-point system (324 U. S. 726, 736–737). Congress on the contrary, this Court said (p. 737), "left the legality of such systems to be determined accordingly as they might be within the reach of §2 (a), as enacted"; in other words, a basing-point pricing system was neither necessarily legal nor necessarily illegal under Section 2 of the Act.

Respondents have relied upon the statement in the *Corn Products* case (p. 735) that the Court had "no occasion to decide" whether a multiple basing-point delivered-price system "is permissible under the Clayton Act, in view of the provisions of Section 2 (b), permitting reductions in price to meet a competitor's equally low price."

And respondents have emphasized that the Court in the *Staley* case said (p. 757) that it did not follow from its decision that the respondents there "may never absorb freight when their factory price plus actual freight is higher than their competitors' price." But these statements merely make clear that the Court confined its decisions to the issues presented for determination. The statements carry no implication that the Court was of the opinion that a multiple-basing point delivered-price system such as respondents' falls outside the prohibitions of the Clayton Act. The reasoning and grounds of decision in these cases clearly have authoritative force so far as they are applicable to the present cases.

Neither *Maple Flooring Ass'n* v. *United States*, 268 U. S. 563, nor *Cement Manufacturers Ass'n* v. *United States*, 268 U. S. 588, has any present pertinency, first, because they were suits brought under the Sherman Act and, second, because they were decided before the Robinson-Patman Act had stiffened the Clayton Act's prohibitions against price discrimination.

C. *Respondents' Discriminatory Prices Have the Effect and Tendency "Substantially to Lessen Competition" in the Sale of Cement and "to Injure, Destroy, or Prevent Competition" among Themselves, and Constitute Prohibited Price Discrminations*

Respondents have urged that Section 2 of the Clayton Act has no application to the present

proceeding in that price discrimination is forbidden only in so far as it may result in substantially lessened competition between buyers. Their theory is that delivered prices are the same to all dealers in any given locality and that such dealers are unaffected by different prices to dealers in other localities since the two sets of dealers are not in competition with each other. They point particularly to this Court's determination in the *Corn Products* case that under the facts there presented the seller's discriminatory prices might adversely affect competition among purchasers of its product (pp. 738–739). But this obviously was not a holding that the effect on competition which makes a discriminatory price unlawful is confined to this class of parties to sales.

The difficulty with respondents' contention is that it is in the teeth of the unambiguous language of the statute that the requisite effect on competition may be upon sellers as well as buyers. The discriminations which Section 2 (a) forbids are those the effect of which "may be substantially to lessen competition or tend to create a monopoly *in any line of commerce,* or to injure, destroy, or prevent competition with any person who *either grants* or knowingly receives the benefit of such discrimination, or with customers of either of them." [Italics supplied.]

It has never been doubted, we believe, that the competitive effect necessary to render price dis-

criminations unlawful may be the effect on sellers. On the contrary, the view was at one time held that it was only an effect on sellers which was within the statute's reach. Section 2, before its amendment, prohibited price discriminations where the effect may be "substantially to lessen competition," without specifying the competition of whom. Under this language the lower federal courts had held that the requisite effect on competition must be on that between the seller and its rivals. *Mennen Company* v. *Federal Trade Commission,* 288 Fed. 774 (C. C. A. 2), certiorari denied, 262 U. S. 759; *National Biscuit Company* v. *Federal Trade Commission,* 299 Fed. 733 (C. C. A. 2). These decisions were disapproved in *Van Camp & Sons Company* v. *American Can Company,* 278 U. S. 245, where this Court made it clear that the prescribed effect on competition might be on that of either sellers or buyers.

There is nothing in the language or legislative history of the Robinson-Patman Act to alter the rule of the *Van Camp* decision. Rather, Congress squarely approved that holding by explicitly providing that the competition adversely affected might be that of those who "grant" the discriminatory price. Reports of both Senate and House Committees on the bill which eventuated in the Robinson-Patman Act state that the language concerning effect on competition represents a "sub-

stantial broadening" of similar language in the existing Section 2 of the Clayton Act.[80]

Here the Commission has found in almost the precise words of the statute that the effect of respondents' discriminations "has been and may be substantially to lessen competition and tend to create a monopoly in the sale and distribution of cement, and has been and may be to injure, destroy, and prevent competition with respondents who grant and exact such discriminations" (Fng. 25, R. 16131).[81] We take it to be beyond question that this finding is supported by evidence since the systematic discriminatory prices exacted by each respondent produce identical prices among them.

III

THE COURT BELOW MISAPPREHENDED THE MEANING AND ECONOMIC EFFECTS OF THE COMMISSION'S ORDER

The court below assumed that the order entered by the Commission has a sweep and effect far beyond that conveyed by the language of the order itself. The court construed the

[80] S. Rep. No. 1502, 74th Cong. 2d sess., p. 4; H. Rep. No. 2287, 74th Cong. 2d sess., p. 8.

[81] We point out that the Commission found that the prescribed effect on competition has been realized, although the statute requires no more than the probability that this will happen (*Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346).

order as flatly prohibiting freight absorption under any and all circumstances.[82] The court declared (R. 16815):

> The Commission's order proposes to eliminate the sale of cement on a delivered price basis * * *. Instead, it would require that cement be sold on an f. o. b. plant basis.

We submit that the court below plainly misinterpreted the order of the Commission. The order (R. 16135) directs respondents, in connection with interstate sales of cement, to cease and desist from—

> entering into, continuing, cooperating in, or carrying out *any planned common course of action, understanding, agreement, combination, or conspiracy* between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, *to do or perform any of the following things:*[83]

Then follow four numbered paragraphs, with subdivisions of paragraph 2 (R. 16135–7).

It is plain that under this order there is a violation of its provisions only in the event that

[82] The court said that the Commission's order "would require" a respondent producer to "confine its sales to the territory in which it has an advantage" in freight (R. 16791). It said that such respondent "would be required" by the order to stay out of any market in which it could sell only if it absorbed freight (R. 16794).

[83] Italics supplied.

there is a "planned common course of action, understanding, agreement, combination, or conspiracy" to which a respondent is a party to do something specified in the numbered paragraphs of the order. This is an essential qualification of the prohibitions of these paragraphs. The order therefore leaves each respondent free—provided he acts individually and with that variability in action respecting particular competitive situations which is characteristic of genuine competitive endeavor and a free market—to absorb freight in order to meet a competitor's low price or to sell at a delivered price.

What the order does is to bar acting in concert in adopting, continuing, or implementing the multiple basing-point delivered-price system or any similar system which necessarily operates to suppress price competition. The order is aimed at uprooting the pricing system which has flourished by virtue of the agreement among respondents, charged and found, to stifle price competition by selling cement at identical prices.

The error of the court below is epitomized in its statement that "this court is now urged to hold that the [multiple basing-point delivered-price] system is illegal *per se*, and to require that cement be sold on an f. o. b. plant basis" (R. 16815). The system as such was not attacked; what

was attacked was agreement to maintain and implement the system and to eliminate price competition.

We think that under the facts of this case an inference of agreement could reasonably be drawn from the existence of the system alone. We have already indicated our view that it is open to serious doubt whether a system so widely and consistently used and followed as respondents' could be maintained in the absence of agreement (*supra*, p. 59). Had the Commission inferred agreement from the system alone, it might loosely be said that the system itself was attacked as illegal *per se*. But this is not what the Commission did. Its searching inquiry disclosed in specific detail the collective action which had been taken to implement and continue the system. And from all these facts, as well as the existence of the system itself, the Commission found combination among respondents to suppress price competition.

The court, by reason of misinterpreting the meaning of the Commission's order, misconceived the effect which enforcement would have. It declared that if respondent producers follow the course which the Commission's order would require, "each will have a monopoly in its own territory and competition will be at an end" (R.

16791)." This represented adoption of a view stressed by respondents in the court below. They contended: "If cement mills are barred from freight absorption—and that is what the Commission is seeking to do—then there will be a restraint of competition, not otherwise. A fence of rail freight rates or other transportation cost will be built around each mill and there will be no means of escape. A series of monopolies, not competition, will be the result." (Institute Brief 37.)

We point out initially that this "local monopoly" argument proceeds upon the false premise that the Commission's order is an universal prohibition of freight absorption. The Commission's order does not forbid freight absorption as such nor do we anticipate that its practical effect will be to preclude all freight absorption by sellers of cement. We do anticipate that the order will preclude mutual and common use of any pricing

---

"In repetition of the same thought, the court said (R. 16800):

"[The Commission] proposes to make supreme the advantage of a mill selling in the territory where it has a freight advantage, and to make its disadvantage so great when selling in a competitor's territory as to practically preclude it from entering that market. In fact, the advantage and disadvantage would no longer be natural but artificial, effected by the requirement that each mill sell on an f..o. b. mill price. The change from the present system to one conforming with the Commission's order would be like jumping from the frying pan into the fire."

formula in which, as at present, freight absorption is systematic, frequently flagrant (in relation to sales price), and mutually practiced by all concerned.[85]

To the extent that the Commission's order operates to eliminate freight absorption, mills will be encouraged to concentrate their sales in the nearby areas in which transportation costs to the buyer's destination are lowest, with consequent reduction in wasteful cross-hauling or its equivalent. In the past respondents have, in effect, reciprocally waived the advantages of their location in order that they might have identical delivered prices everywhere. A necessary condition to this system of marketing is the setting of artificially high base prices, which enable the various mills to sell much of their product at prices which bring a net return substantially below their own base prices.

The court below believed that if a mill is not permitted to absorb freight, "it is reasonable to think that its unit cost of production * * * would be considerably increased and the price of cement to its home customers increased accordingly" and thus the Commission's solicitude for home customers "would in all probability result

[85] Section 2 (a) of the Clayton Act would not preclude freight absorptions different from the present systematic ones. Many such absorptions would not have the effect on competition which would make them unlawful and still others would be within the justification of Section 2 (b).

to their detriment" (R. 16794). The fallacy of this reasoning is apparent when the over-all aspects of the situation are brought into view. Any volume gained by one mill which is not caused by increased total demand is volume lost by another. As one mill presumably decreases its unit cost by increasing its volume through sales beyond its natural home area, another mill presumably increases its unit costs because of decreasing volume. We do not say that if systematic freight absorption is disallowed, the volume of each individual producer will nevertheless remain at its previous level. There may be substantial individual gains or losses in production, but these will result because normal competitive factors again have free play in the industry.

Possibly respondents will concede the correctness of this analysis, but will urge that the present system permits greater stability and flexibility in that there may be particular circumstances in which a producer, owing to slack orders or other temporary conditions, will find it advantageous to sell at a lesser mill net so long as it recovers at least the out-of-pocket costs of production. But we believe that there is latitude under the Commission's order for this kind of selling provided that it does not result in prohibited price discriminations. To the extent that such selling does so result, respondents' complaint

is directed against the legislative policy adopted by Congress.[56]

What a system such as respondents', which countenances and fosters frequent and substantial freight absorption, does lead to is economically wasteful cross-hauling (Fng. 23 (c), R. 16126). Two producers substantially distant from each other freightwise, will frequently find themselves simultaneously selling cement for delivery almost at each other's door. We do not understand that respondents dispute the existence of cross-hauling or that its effect inevitably is to raise the total bill paid by consumers. The defense is that cross-hauling is one of the unavoidable economic wastes of free competition. Economists called by the Commission testified, however, that cross-hauling occurs only fortuitously and sporadically under normal competitive conditions and that its existence indicates absence of a free competitive market (R. 5152, 5160–1, 5205, 5813).

Possibly respondents will urge that the non-competitive patterns developed by and under their multiple-basing point delivered-price system were peculiarly suited to the needs of the cement industry and that to overthrow this system would lead

[56] Respondents have also urged that their system tends to increase the number of sellers at any given point and the system, so it is said, thereby promotes competition to the benefit of purchasers. But when all sellers offer their product at identical prices and terms, a greater number of sellers is of no material advantage to purchasers.

to unrestrained competition, ruinous to producers and, ultimately, to the consuming public. Such calamitous forecasts by counsel in proceedings under the antitrust laws are familiar. In this case, at least, they are both inherently speculative and without substantial evidentiary support. Even if they were true, the answer is that made by this Court to a similar argument in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 561:

> Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this Court.

And in one of the earliest cases under the Sherman Act this Court, in reply to contentions that application of the Sherman Act to interstate railroads would be disastrous to their business and unwise as a matter of public policy, said: "These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy". *Northern Securities Co.* v. *United States*, 193 U. S. 197, 352.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed, with directions to affirm the order of the Federal Trade Commission as to all of the respondents.

PHILIP B. PERLMAN,
Solicitor General.

JOHN F. SONNETT,
Assistant Attorney General.

CHARLES H. WESTON,
ROBERT G. SEAKS,
PHILIP ELMAN,
Special Assistants to the Attorney General.

W. T. KELLEY,
General Counsel,

WALTER B. WOODEN,
Associate General Counsel,
Federal Trade Commission.

SEPTEMBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947